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RETHINKING RIGHTLESSNESS

The “Right to Have Rights” and the EU-Turkey Statement

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ABSTRACT

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The migration “crisis” in 2015, the largest human displacement since the end of World War II, made people become aware of the existence of a “right to have rights” and a right to belong to some kind of organized community once again when the refugee who had been forced to flee his or her country of origin lost and could not regain or enjoy these rights elsewhere. This has also demonstrated that human rights indeed need a prerequisite right to be more than citizenship rights: that is the “right to have rights,” which must be guaranteed by humanity itself. Following the summer of migration in 2015, the EU and Turkey came to a deal on 18 March 2016, which is officially known as the EU-Turkey Statement. The implementation of the Statement raised concerns especially over the human rights violations it entails vis-à-vis the migrants who are returned from the Greek islands to Turkey or who are expelled from the EU territory at the very Greek-Turkish border. However, this study argues that rather than “merely” depriving migrants of certain set of rights enshrined in international and regional human rights instruments, the EU-Turkey Statement deprives them of a more fundamental “right to have rights” – which also puts other rights in jeopardy.

Despite the developments in international law since Hannah Arendt coined the “right to have rights” in *The Origins of Totalitarianism* in 1951, the ever-existing gaps in international law still create an area of maneuver for states and incentivize them to engage in the externalization of migration management. From the outset, the externalization of migration management has been on the EU agenda and embedded in the very core of the Common European Asylum System. The adoption of the EU-Turkey Statement, as well as its implementation, too, have resulted from the EU’s rationale to prevent the “irregular” migrants from reaching the EU territory and to divert the burden of migration management and of protection to non-EU third countries. In fact, the EU-Turkey Statement can be considered the utmost specimen of the EU’s efforts to externalize the management of migration. Furthermore, this thesis considers the EU-Turkey Statement not as one single statement, but a bundle of commitments, measures and practices. Therefore, it assesses the EU-Turkey Statement with the relevant practices, aspects and developments – as the gravity of human rights issues that asylum seekers and refugees encounter at the Greek-Turkish border, in Turkey and on the Greek islands is closely connected with the Statement and the preceding undertakings of the parties.

Among the formal and informal instruments of the externalization of migration management, this thesis scrutinizes in the context of the EU-Turkey Statement the concept of “safe third country,” readmission agreements, and interception of migrants at maritime and land borders. Drawing upon the legal dogmatic method, the thesis first analyzes the impact of these three instruments on the rights of asylum seekers and refugees on the Greek islands, at the Greek-Turkish border, and in Turkey. Second, against the backdrop of the Arendtian “right to have rights,” it argues that the problem today is in fact access to a “right to have rights.” Indeed, the refugee who is excluded due to the implementation of the EU-Turkey Statement from the state territory (at *the border*), from the general application of law (by way of *the law*) and from the space of appearance (in *the polis*) is prevented from accessing safe soils, to asylum (procedures) or a durable juridico-politico status, and to a politically organized community for the claim and enjoyment of human rights.

Keywords: Hannah Arendt, right to have rights, EU-Turkey Statement, refugees, asylum seekers, human rights, migration crisis

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List of Latin/Legal Terms

Term	Description
<i>a fortiori</i>	Used to express a conclusion for which there is stronger evidence than for a previously accepted one (Oxford Dictionary, 2019a).
<i>acquis (communautaire)</i>	The body of accumulated legislation and regulations of the European Union (formerly the European Community) (Oxford Dictionary, 2019b).
<i>conditio sine qua non</i>	A condition without which another phenomenon cannot be realized.
<i>homo sacer</i>	Sacred man. A phrase used by Italian philosopher Giorgio Agamben to challenge the concept of human rights which was promulgated as the “sacred rights of man” in the Enlightenment era.
<i>jus cogens</i>	The principles which form the norms of international law that cannot be set aside (Oxford Dictionary, 2019c).
<i>modus operandi</i>	A particular way or method of doing something (Oxford Dictionary, 2019d).
<i>qua</i>	In the capacity of; as being (Oxford Dictionary, 2019e).
<i>terminus a quo</i>	A starting point or initial impulse (Oxford Dictionary, 2019f).
<i>viva activa</i>	Active life. A term used by Hannah Arendt in <i>The Human Condition</i> as being connected to the basic conditions of human existence. It is the contrast of a “deprived life.”

List of Abbreviations

Amnesty	Amnesty International
APD	The 2013 Asylum Procedures Directive (Directive 2013/32/EU)
CAT	The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CFREU	The Charter of Fundamental Rights of the European Union
CLS	Critical Legal Studies
CoE	Council of Europe
CPT	The Council of Europe's Committee for the Prevention of Torture
DGMM	The Directorate General of Migration Management (Turkey)
DRMC	The 1789 French Declaration of the Rights of Man and of the Citizen
EC	European Community
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EESC	The European Economic and Social Committee
EU	European Union
Frontex	European Border and Coast Guard Agency
GAM	The 2005 Global Approach to Migration
GAMM	The 2011 Global Approach to Migration and Development
HRW	Human Rights Watch
ICCPR	The 1963 International Convention on Civil and Political Rights
ICJ Statute	The Statute of the International Court of Justice
ILO(s)	immigration liaison officer(s)
IOM	International Organization for Migration
JAP	The EU-Turkey Joint Action Plan of 15 October 2015
LFIP	The Law No. 6458 on Foreigners and International Protection (Turkey)
NGO(s)	non-governmental organization(s)
Qualifications Directive	The 2011 Asylum Qualifications Directive (Directive 2011/95/EU)
Refugee Convention	The 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TPR	Temporary Protection Regulation (Turkey)
<i>The Origins</i>	<i>The Origins of Totalitarianism</i> (Arendt, 1979)
UDHR	The 1948 Universal Declaration of Human Rights
UN	The United Nations
UNGA	The United Nations General Assembly
UNHCR	The United Nations High Commissioner of Refugees
UN HRC	The United Nations Human Rights Committee
USDI	The 1776 United States Declaration of Independence
VCLT	The 1969 Vienna Convention on the Law of Treaties

Terminology

Term	Description
Asylum seekers	Asylum seekers are defined under EU law (CoE, 2015) and international law (IOM, 2011, p. 12) as persons seeking international protection from persecution or other serious harm, and awaiting the determination of their status under pertinent international and national legal instruments. Asylum seekers cannot return or be returned to their countries of origin (CoE, 2015, p. 43).
Irregular migration	Migration that is realized outside the regulatory norms of the countries of emigration, transit and immigration. The term “irregular migration” does not have a clearly defined or universally accepted definition. (IOM, 2011, p. 54) Among irregular migrants attempting to reach the border of a state, it is highly likely that there are asylum seekers and refugees who seek protection in that state.
Migrant	No universally accepted definition for the term “migrant” exists at the international level. The term usually covers the cases where the decision to migrate is freely given by the individual without an external compelling reason. (IOM, 2011, p. 61) In this study, the term covers also the cases of forced migration, whereby the decision by individuals are not freely taken. Thus, it encapsulates both asylum seekers and refugees.
<i>Non-refoulement</i>	The principle of <i>non-refoulement</i> constitutes the backbone of international refugee law. It strictly prohibits states to expel or return the individuals to the countries where they will encounter serious human rights violations.
Refugee	The term “refugee” may be ascribed a different meaning in national legislations. Under the Refugee Convention, regardless of a legal status given by a national or international authority, a refugee is a person “owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Article 1, Refugee Convention).

Due to the elusiveness of the concepts of “asylum seeker” and “refugee” in international law, EU law and national laws, as well as in literature; in this thesis, (i) “refugee” and “asylum seeker” may be used interchangeably, (ii) “refugee” and “asylum seeker” may be severally used as is, or (iii) “refugee” may connote both “refugee” and “asylum seeker.”

CHAPTER I

Introduction

1.1. Background

The migration crisis¹ has been pronounced the largest displacement in the world since World War II with over one million “irregular” crossings in 2015 from the EU’s external borders at the Mediterranean Sea. Especially the Eastern Mediterranean, i.e. the maritime border between Greece and Turkey, witnessed an unprecedented humanitarian crisis. Rather than providing effective protection for those who lack protection and their rights in their countries of origin, the EU imposed restrictive measures at its external borders by cooperating with third countries for the management of irregular migration. Hence, as regards the migration crisis, the EU seems to have solved only its own problem, but the issue pertaining to the rights of refugees and asylum seekers still persists: the crisis remains and refugees are still somewhere behind the borders, without a “right to have rights.”

With a view to staunching the flow of migrants arriving in the EU following the 2015 migration crisis, the EU and Turkey sought to come to a deal in the autumn of 2015. In order to tackle the immense migrant flows and migrant smuggling activities in the region, the EU and Turkey adopted the so-called EU-Turkey Statement on 18 March 2016. Accordingly, asylum seekers who do not lodge an asylum application on the Greek islands or whose asylum applications are found to be inadmissible are returned to Turkey without further investigation, as Turkey is considered “safe” for them. In addition to this formal measure of the return of asylum seekers to Turkey, some thousands are intercepted and informally pushed back to Turkish territory. While the question of whether these asylum seekers are given the possibility to lodge their asylum applications with the Greek asylum authorities is a matter of debate, millions of them are abandoned in Turkey by virtue of the implementation of the EU-Turkey Statement without “quality protection.” This means that, while asylum seekers on the Greek islands wait for lengthy periods as the Greek asylum system is currently overburdened with procedural shortcomings, the returnees in Turkey on the other side are not guaranteed effective protection and access to certain set of rights.

Currently having the highest refugee population in the world with almost 4 million refugees, Turkey hosts more than 3.6 million registered Syrian refugees (UNHCR, 2018a). However, the protection

¹ This thesis prefers the usage of “migration crisis” as it considers that the reason the summer of migration in 2015 turned out to be a “crisis” was mainly because the EU failed to find effective solutions to provide protection to migrants (including refugees and asylum seekers) coming at its external borders. Therefore, unlike the common usage in literature and media, this study considers it is not the “refugee” or “migrant” that created the crisis, but the EU itself.

regime for refugees in Turkey still lacks certain requirements of international refugee law. In fact, Turkey retains a geographical restriction for the application of the Refugee Convention; hence, it does not recognize the persons with non-European origins as “refugees.” Rather, it only grants a conditional refugee status to non-Syrians, and applies a temporary protection regime for Syrians. In addition, the treatment of the refugees and asylum seekers in detention and deportation centers, as well as the Turkish authorities’ disregard of the principle of *non-refoulement* through expulsion and return practices have been severely criticized by NGOs and international organizations in the last two decades. Therefore, these instances lead to the question as to whether the exclusion of asylum seekers and refugees from the EU territory towards Turkey (through the management of migration in and from Turkey), as well as in the Greek hotspots circumvent their “right to have rights.” Indeed, asylum seekers and refugees in Turkey, at the Greek-Turkish border and the Greek hotspots, who cannot access to asylum in line with the Refugee Convention, also face the risk of being expelled or returned to the countries where their life or freedom would be threatened. As a result, they cannot access to a politically organized community, where they would otherwise claim and enjoy their human rights, hence are deprived of access to a “right to have rights.”

Why are there still refugees and asylum seekers deprived of the channels of acting politically to claim their rights in Greece and Turkey if human rights are inalienable, inherent and universal? The early political and legal thinkers argued that human rights emanate from God’s ordainment, or from inside and between human beings, or as more secular ones suggested, from the laws of the society. Concordantly, human rights have been manifested as the inherent “Rights of Man” or the “Rights of the Citizen” in the Enlightenment era, and that they do not need a higher authority to be enjoyed. What theorists did not consider, however, was that when the God’s ordainment is not taken into account by human beings, when there is no other human being recognizing the rights of a human being, when there is no government acknowledging the rights of the “right bearers,” human rights become at stake. Because the one and only *sine qua non* right for the claim and enjoyment of human rights is the “right to have rights.” Without a “right to have rights,” the man, the citizen, the refugee, the stateless are all left in their bare humanity.

In this connection, Hannah Arendt’s criticism of the concept of human rights and skepticism towards nation-states in a state-centric world order guaranteeing such rights can be considered to be still valid. By fleeing Syria and elsewhere and thereby being deprived of a “right to have rights,” the refugee loses his or her action and opinion to claim his or her rights. In fact, human rights that are manifested universal, inherent and inalienable for centuries cannot be regained either in Greece or Turkey. This can be seen as a vindication of Hannah Arendt once again: despite the significant developments in international law since the end of World War II, the rights of the refugee retain its perplexity. Almost seventy years ago, Arendt lamented the fact that wars create millions of stateless, and concomitantly rightless, persons just because they lose their citizenship rights in their countries of origin. Their loss of citizenship rights is in fact

manifested in being deprived of a place in the world, as they can no longer enjoy these rights elsewhere in the world. This is because when one is deprived of membership to organized political community, other rights become highly precarious, and one remains excluded from freedom and equality that only come with citizenship rights.

In this sense, it can be argued that the practice of externalizing the management of migration by virtue of the deal between the EU and Turkey clearly disregards the access of refugees to some kind of organized community, hence to a “right to have rights.” Therefore, rather than “merely” depriving the refugee of certain rights, the EU-Turkey Statement deprives them of a more fundamental “right to have rights.”

1.2. Research Objective and Research Questions

The overall aim of the research is to examine the effects of the externalization of migration management on the rights of asylum seekers and refugees at the Greek-Turkish borders, on the Greek islands and in Turkey, by drawing upon the Arendtian “right to have rights.” The aim must not be construed as finding or proposing solutions to the “refugee question” in Turkey or the EU (or particularly, in Greece), nor underestimating the role of international supervisory mechanisms, courts or institutions upholding human rights. Rather, the aim is to provide an understanding to the human rights issues that refugees and asylum seekers in the given geographies encounter: why and how are asylum seekers and refugees still deprived of a “right to have rights” in an age of rights?

The focus of analysis is the EU-Turkey Statement which was concluded after the 2015 migration crisis, as well as the pertinent aspects and developments ensuing from mid-2015 until February 2019. The Statement stands out as a quintessence of the EU’s measures to externalize the management of migration, as it comprises several instruments of externalization: return of all irregular migrants who are not in need of international protection in Greece to Turkey, interceptions operated by Greece in the Aegean Sea² and at the Evros River³, deployment of ILOs in Turkey, as well as training and capacity building of Turkish coast guards, and designation of Turkey as a safe third country for asylum seekers or a first country of asylum for refugees. In addition, it has been discussed at EU level that agreements similar to the EU-Turkey deal should be reached with other third countries, including ones in North Africa (Goulard, 2016).⁴ Therefore, as the disavowal of the rights of asylum seekers and refugees due to the implementation of the EU-

² The Aegean Sea is an embayment of the Mediterranean Sea located between Turkey and Greece. The so-called “Eastern Mediterranean route” denotes the sea crossings over the Aegean Sea, i.e. from Turkey to the Greek islands. The islands lie in close proximity to the Turkish coast.

³ The Evros (or Maritsa) River constitutes the natural land border between Greece and Turkey.

⁴ It is noteworthy to recall herein that the externalization of migration management in the EU has a history of almost three decades. For instance, several bilateral agreements on migration have been signed between EU Member States and north-African counterparts before the EU-Turkey Statement (e.g. Italy-Libya, Spain-Morocco).

Turkey Statement will potentially be reinforced by its replication to a wider context, it is extremely important to understand the impact of the Statement on their rights. Upon the conduct of an in-depth literature review in this context, it is found that there is no comprehensive literature on the impact of the Statement on the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands and in Turkey from the perspective of Arendtian “right to have rights.”

In the light of the background explained above, the research will address the following questions:

- (1) *What is the impact of the EU-Turkey Statement of 18 March 2016, an instrument utilized by the EU to externalize the management of migration, on the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands and in Turkey?*
- (2) *How can the Arendtian “right to have rights” help us to understand the situation of the asylum seekers and refugees who are deprived of acting politically at the Greek-Turkish border, on the Greek islands and in Turkey by virtue of the EU-Turkey Statement?*

1.3. Scope of the Study

The study will scrutinize the impact of the EU-Turkey Statement of 18 March 2016 on the rights of asylum seekers and refugees from the lens of Arendtian “right to have rights.” By doing so, it will concentrate on three different instruments of externalization that are identified in literature and in the EU policy and legal documents: namely *the interception at maritime and land borders*, *the safe third country principle*, and *readmission agreements*, principally in the context of Turkey. The research will be confined geographically to the Greek-Turkish maritime and land borders when examining the impact of interdictions in the Aegean Sea and at the Evros River, and to the overall situation in Turkey and on the Greek islands as to the treatment of refugees and asylum seekers when analyzing the EU-Turkey Readmission Agreement and considering whether Turkey is a safe third country for asylum seekers or a first country of asylum for refugees. Although the study considers the legal and policy developments from a wider time period, the analysis (*CHAPTER V*) concentrates mainly on the developments from October 2015 until February 2019.

At this juncture, it is also noteworthy to draw a line between the concept of externalization and other measures adopted by the EU through mobilizing third countries. Such a distinction is significant for demonstrating the scope of this research, especially since other measures are explicitly left out of its coverage. Both Boswell (2003) and Lavenex (2006) distinguish two different measures the EU has been utilizing to restrict and manage migration: “preventive approach” and “restrictive approach.” The latter effectively means the externalization of migration management, but both result from the EU’s attempt to address migration management through cooperating with migrant-sending countries and the transit countries (Boswell, 2003). A preventive approach aims to preclude migrants from leaving their countries through improving social and legal context, including the human rights conditions, as well as enhancing economic

opportunities within those countries (Boswell, 2003; Lavenex, 2006). Unlike the externalization of migration management (i.e. the restrictive approach), a preventive approach focuses on tackling the root causes of migration in the countries of origin, and is often associated with development (European Parliament, 2017; UNDP, 2015). In contrast, the restrictive approach, i.e. externalization of migration management, denotes a different phenomenon. It aims to tackle irregular migration at the external borders or within third countries, rather than its root causes. As identified further in *CHAPTER IV*, it is salient that externalization, not the preventive approach, is the focus of this research.⁵

1.4. Methods and Data

Although the point of departure for the assessment of the EU-Turkey Statement in this study is the legal dogmatic method, the overall analysis is akin to CLS that combine law with the political philosophy of Arendt. The idea is to present a thorough legal analysis of how the EU-Turkey Statement influences the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands and in Turkey, and examining this situation from Arendt's perspective on human rights. Overall, this study considers that the conventional tools of positive legal analysis remain unsatisfactory to explain the contemporary global phenomena that surround us, hence, bases its ultimate argumentation on the Arendtian "right to have rights."

1.4.1. Legal Dogmatic Method

The analysis of the first research question is based on the legal rules enshrined in international law, European law⁶, and Turkish law. To do this, the sources of international law designated in Article 38 of the ICJ Statute are taken into account: (a) international conventions; (b) customary international law⁷ rules; (c) general principles of law; (d) judicial decisions and the teachings of highly qualified publicists (UN, 1946).

In this study, the three instruments of externalization (i.e. safe third country concept, readmission agreements, interception at maritime and land borders) in the context of the EU-Turkey Statement are considered regarding their effects on the obligation of *non-refoulement*, the right to asylum, and certain other rights. As to these three instruments, the sources of EU law⁸ are considered (see *Section 4.2*). As to the right

⁵ It is also important to note here that a growing body of critical work in the social and political sciences questions this distinction. For instance, Andersson's (2014, 2016) "illegality industry" and "migration-development-security" nexus, as well as the so-called "root causes" approach to migration problematize this distinction. However, given the scope of this thesis, this distinction is maintained and the focus is given to the externalization of migration management.

⁶ In this study, European law involves both the application of the ECHR (by the members of the CoE) and EU law.

⁷ Customary international law connotes international obligations arising from wide-spread and consistent state practices built over the years, which are accompanied by *opinio juris* (Cornell Law School, s.a.-a).

⁸ European Union law (i.e. *acquis communautaire* or EU *acquis*) comprises of a plethora of instruments, i.e. primary law including TFEU, TEU; secondary law including regulations, directives, communications, international agreements signed by the EU; and supplementary law, including the case law of the CJEU.

to (seek and enjoy) asylum, pertinent articles in UDHR and CFREU are considered (see *Sections 2.4* and *5.1.2*). Regarding the examination of the prohibition of *refoulement* in *Sections 5.1.1.c*, *5.1.2* and *5.1.3*, only the provisions of the Refugee Convention and the ECHR are taken into consideration. Regarding, other human rights (i.e. right to life, right to liberty, prohibition of torture and other cruel or inhuman or degrading treatment and punishment), only ICCPR and ECHR are considered in *Section 5.1.1.a*, and only Article 3 of the ECHR is examined in *Section 5.1.1.b*. In addition, a number of the decisions of the European courts (i.e. CJEU, ECtHR), as well as commentaries of qualified international lawyers are presented.

As to the examination of the Turkish asylum regime, sources of Turkish law are considered. While *Section 4.3.1* sets out on what legal basis the Turkish asylum regime is constituted, *Section 4.3.2* considers the scope of protection provided to non-Europeans in Turkey under this regime to examine how asylum seekers and refugees returned or expelled to Turkey from Greece are/would be treated. According to the Turkish Constitution, the sources of Turkish law comprise of (1) the Constitution, (2) international treaties concerning fundamental rights and freedoms, (3) laws, presidential decrees enacted in the state of emergency, other international treaties, (4) presidential decrees concerning the executive organ, (5) regulations, and (6) other instruments of the executive organ. The hierarchy between these sources of law is according to the order given in the previous sentence. The relevant provisions are considered in *Section 5.1.1.d*.

In addition, throughout the examination of the impact of the EU-Turkey Statement on the rights of asylum seekers and refugees in Turkey and Greece, the reports of international organizations (e.g. UNHCR, CoE, CPT) and NGOs (e.g. ECRE, HRW, Amnesty) are utilized. Such sources are deemed credible also by European courts, including the ECtHR, in a number of cases.⁹ Furthermore, the opinions adopted by UNHCR are taken into account (e.g. UNHCR Executive Committee meetings), as it is the primary responsible international organization for the supervision of the implementation of the Refugee Convention (Article 35, Refugee Convention). Although it is unclear as to whether these opinions are binding, the EU recognizes the role of the UNHCR in that “Member States shall allow UNHCR ... to present views, in the exercise of its supervisory responsibilities ...” (Article 29, APD). The study, therefore, considers also the reports of international organizations and NGOs, and the views of the UNHCR for the analysis of research materials.

1.4.2. Critical Legal Studies

In the second and final stage of the data analysis, the study supplements the legal dogmatic method with CLS by merging law with the political philosophy of Arendt on human rights. Identifying what constitutes CLS is not easy as the movement is too diverse (Russell, 1986). The CLS movement first appeared in 1970s by taking its roots from Legal Realism as a response to the skepticism towards Legal Positivism,

⁹ See for instance *M.S.S. v. Belgium and Greece* where the Court considered the reports of human rights organizations (e.g. ECRE) and international organizations (e.g. UNHCR, CoE) as reliable sources of evidences (ECtHR, 2011).

which fell short of providing a fulfilling analysis of law in a swiftly changing society (idem, p. 4). According to CLS scholars, law and society are intertwined with each other (ibid.). They assume that “society is constituted by the world views that give meaning to social interactions,” hence, “a change in [modern legal] consciousness [reflecting the dominant world views] should result in a change in society” (idem, p. 9). “One of the central goals of CLS is the dejustification of legal rules” with social action (idem, p. 7). According to CLS scholars, legal principles are indeterminate as the rules in force involve substantial gaps, conflicts, and ambiguities (The Bridge, s.a.). This is because the law reflects the interests of those who make the law and used as an instrument for oppression by them (Cornell Law School, s.a.-b; Russell, 1986).

CLS scholars admit that CLS does not involve clear cut boundaries: that is what makes CLS more inclusive and interdisciplinary. Two of the pioneers of CLS, Duncan Kennedy and Karl Klare explained that “[CLS] ... does not reflect any agreed set of political tenets or methodological approaches” (Russell, 1986, p. 4). In addition, CLS does not involve a common analysis, but more reflects a “profound disenchantment with ‘liberal legalism’” (idem, p. 11). While liberalism, the dominant Western ideology, views the world in a set of contradictory dualities and values, and attempts to cloak the conflict in such dualities and values partly through law, CLS addresses “the exposure of the contradictions in liberal legal philosophy” (ibid). This research, too, speaks to the gaps (resulting in an area of maneuver for states), dualities (legal migration v. irregular migration, insiders v. outsiders, Europeans v. non-Europeans), conflicts (state sovereignty v. human rights), and ambiguities (the incapability of the theory of human rights to explain the “right to have rights”) embedded in international law, the EU *acquis* and the Turkish asylum regime.

Addressing the issues of her period with a critical perspective, Arendt must also be considered as a significant critical legal thinker. Her disenchantment with the human rights protection regime in her era reflects the gaps, conflicts, perplexities, and dualities embedded in the nation-state system. Against the backdrop of her criticism on human rights, this study adopts a critical stance to argue that the ever-existing gaps in international law lead to an area of maneuver for states. Drawing upon the challenge posed by the concepts of territory, borders, citizenship and state sovereignty vis-à-vis human rights, the study problematizes this area of maneuver. This area availed by states leads to the externalization of migration management and to the adoption by the EU and Turkey of the EU-Turkey Statement in particular, and deprives the refugee of access to a right to have rights. As the study argues, despite the safeguards enshrined in human rights instruments, the capacity to act politically for one’s human rights indeed need to be guaranteed in a particular political institution, e.g. a nation-state. One’s other rights, otherwise, become highly precarious.

1.5. Outline

This thesis comprises of six chapters in total. *CHAPTER II* provides an insight into Hannah Arendt’s critique of the concept of human rights which is intertwined with her skepticism towards the nation-

states in a state-centric world order. Although human rights have been manifested *qua* inalienable, inherent and universal in numerous human rights declarations and documents for centuries, the prerequisite right i.e. the “right to have rights,” or the right to membership in a political community, in fact must be guaranteed in a particular political institution. It articulates that the deprivation of these rights leaves the refugee incapable of “fighting for [his or her] freedom” (Arendt, 1979, p. 297).

CHAPTER III outlines some of the normative guarantees under the UDHR, the ICCPR, the ECHR, the Refugee Convention with regard to the rights to life and to liberty, the prohibition of torture et al., and the secondary rights that may be granted to protection seekers with a view to establishing the framework for the examination of the first research question presented above.

Drawing upon the concepts of territory, state sovereignty, borders, citizenship and human rights identified in *CHAPTER II*, *CHAPTER IV* articulates the interrelation between these concepts and the externalization of migration management, and discusses the past and current externalization practices of the EU. The chapter also examines the origins of the CEAS, which also provides for the legal basis of externalization and of externalization instruments in the EU context. In this regard, *safe third country principle*, *readmission agreements* and *interception at maritime and land borders* are respectively addressed. The final section of *CHAPTER IV* specifically concentrates on the evaluation of the Turkish asylum regime under the influence of the EU, and on the EU-Turkey Statement of 18 March 2016.

CHAPTER V contextualizes the three instruments identified in *CHAPTER IV* against the backdrop of the EU-Turkey Statement to probe the influence of the Statement on the rights of asylum seekers and refugees at the borders, on the Greek islands and in Turkey. *Section 5.1* scrutinizes whether Turkey can be considered (under Article 38(1) of the APD) a safe third country for asylum seekers and a first country of asylum for refugees who are returned from the Greek islands to Turkey (*Section 5.1.1*), how the rights of those asylum seekers and refugees are/would be affected on the Greek islands and in Turkey (*Section 5.1.2*), and how informal interceptions at the Greek-Turkish land and sea borders affect the rights of those who attempt to cross from Turkey to the territory of the EU (*Section 5.1.3*).

In *Section 5.2*, the study turns back to Arendt to shed light on how and why asylum seekers and refugees at the borders, on the Greek islands and in Turkey are still left rightless in an age of rights. It examines how the exclusion of asylum seekers and refugees from state territories (at *the border*), from the general application of law (by way of *the law*), and from the space of appearance (in *the polis*) through the externalization of migration management in general, and the implementation of the EU-Turkey Statement in particular, deprives them of a fundamental “right to have rights.” *CHAPTER VI* summarizes and discusses the findings as to the two research questions set out in *Section 1.2*, and proposes future implications with regard to the analysis of contemporary human rights issues with the Arendtian “right to have rights.”

CHAPTER II

On the Arendtian Critique of Human Rights

“Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth.”
—Hannah Arendt, *The Origins of Totalitarianism*

This Chapter outlines the Arendtian “right to have rights” as the theoretical and conceptual framework of this thesis. Overall, it provides an understanding for Arendt’s criticism on the concept of human rights, with a specific focus on the refugees at our time, and by crystallizing the interrelation between the concepts of territory, state sovereignty, borders, citizenship, and human rights. The framework also draws upon *The Human Condition*, *What is Freedom?*, and *On Revolution* to better conceive the Arendtian thought on human rights and its relevance to the concepts of freedom and equality. *Section 2.1* presents how the theoretical discussions on the concept of human rights have evolved in time. *Section 2.2* articulates that a “right to have rights,” *inter alia*, is a convenient framework to assess the empirical study in this thesis. *Section 2.3* reflects on the different understandings in the literature of the Arendtian right to have rights by questioning what a “right to have rights” denotes. It argues that the loss of membership in a politically organized community, i.e. of a “right to have rights,” renders the claim and enjoyment of other rights impossible. It also discusses that due to the ever-existing gaps in international law, states endeavor to prevent the refugee’s access to their territory, to asylum procedures, and to some kind of organized community in their territory. *Section 2.4* examines the “right to have rights” as the right to (seek and enjoy) asylum since today the right to citizenship is not the only juridico-political status to belong to a politically organized community.

2.1. Human Rights in Political and Legal Theory

The concept of human rights, especially their origin, has been the subject of both political and legal theory for centuries. The main point of confrontation of the earlier thinkers arose from the origin of human rights: whether rights arise from divine revelation or are inherent in being a human being such that their origins are indisputable, or whether rights are the artifice of the laws of a society (Heard, 1997). First, the natural rights tradition proponents developed the idea that human rights emanate from natural law. According to Aquinas, God ordained humans that there are goods or behaviors which are naturally right or wrong (ibid.), hence, rights emanate from a divine power. Second, the idea that rights arise from God was partially replaced by the reason of man in the eighteenth century, i.e. the Enlightenment (Langlois, 2013, p. 14). Rather than a list of good or bad behaviors, Hobbes argued that there are claims or entitlements that derive

from our natural humanity (Heard, 1997; Langlois, 2013, p. 14). In contrast, for Locke, it is the natural rights that constitute the bond between individuals as both right bearers and duty holders – hence, there is no political society but only human beings as the source of human rights (Verdirame, 2013, p. 19). In the Kantian perspective, it is the universal principle of freedom which creates moral and legal obligations between individuals (idem, p. 20), and there must be a state organized through the imposition of universally applied laws which must respect “the equality, freedom, and autonomy of the citizens” (Heard, 1997). Theorists including Paine and Rousseau, on the other side, laid a secular idea of natural rights – there are rights which emanate from nature, but also other rights which arise from the social contract within a society (ibid.). The latter, i.e. civil rights, which are appurtenant to being a member of society, set limits on the sovereign’s power and must be protected by the state (ibid.).

Locke’s ideas were later reflected both in USDI and DRMC, which proclaimed rights as “the natural, inalienable and sacred rights of man” (ibid.). In this regard, USDI and DRMC signaled the end of God’s command or the customs *qua* the source of law, as well as of human rights. This perspective merely presumes that human rights emanate from Man himself, and their guarantee is provided as such; hence, it was believed that no higher authority was needed to ensure and protect them (Arendt, 1979; Cotter, 2005, p. 100). This idea, however, was bombarded severely by opponent political thinkers. Liberals, including Bentham, argued that natural rights are unreal and cannot exist since rights can only be created by the law of a society (Heard, 1997; Langlois, 2013). Its counterpart in law, legal positivism, too equates or reduces human rights to legal rights (Langlois, 2013). Accordingly, human rights exist only when laws, agreements or institutions prescribe their existence – in the absence of such prescription, there are no human rights (ibid.). In this respect, the state bears a unique power to enforce the rights of individual right bearers (Verdirame, 2013, p. 19-20), and has therefore positive and negative obligations to guarantee such rights as the duty holder (idem, p. 19). Conservatives famously pioneered by Burke, too, criticized that “the Rights of Man” reflect mere abstractions (Heard, 1997). Burke rejected the idea of natural rights, as man has rights merely because of “the organic traditions and institutions of the society” (Langlois, 2013, p. 15).

The rhetorical framework of natural rights tradition, on the other side, served as a basis also for liberalism, which emerged as a dominant ideology in the nineteenth and twentieth centuries (Heard, 1997). In the contemporary human rights documents that are influenced by Western liberalism, human rights are articulated as universal and inalienable, just as in the Enlightenment declarations. They are universal, because they are *ought to* belong to all human beings in every society (ibid.). They are inalienable, because they are *ought to* protect human existence and cannot be taken away without jeopardizing such existence (ibid.). These values and the liberal political tradition are reflected also in the UDHR.

Many contemporary thinkers argued that “[t]here has been no theoretical development of the idea [of human rights] since [the Enlightenment],” as “the term human rights ... suffers from an

indeterminateness which must be remedied” (Verdirame, 2013, p. 2). In this regard, although CLS scholars have sought to reveal the political bias or inconclusiveness of human rights theory and practice, they eschewed establishing a reconstructive theory (idem, p. 9). The thinkers who attempted to construct a new human rights theory, including Rawls, Beitz and Raz, positioned “their respective theories ... firmly in *international* political theory rather than general political theory” (idem, p. 10). They conceive human rights as limits to the state sovereignty that are enforceable by other states, hence, their violation creates “international concern” and a “basis for interference” by other states for such violation (ibid.).

The early human rights theories do not touch upon the political exclusion of migrants or refugees arising from the conflict between human rights and state sovereignty. In particular, more recent criticisms of the concept of human rights involve the concept of “bare life” in the realm of politics (Larsen, 2013) and “grants the figure of the migrant a certain degree of centrality” (Nail, 2018, p. 15). The lack of human rights is either led by the political exclusion from a state, or by the repression within a state (Larsen, 2013). The supporters of this idea, e.g. Hannah Arendt, Giorgio Agamben, Jacques Rancière, and Étienne Balibar, discuss the relationship between human rights and political exclusion (ibid.), and particularly with reference to migrants and refugees. While juxtaposition of human rights and citizenship rights has been the point of departure for these contemporary political and legal thinkers, they also position the migrant or the refugee to the center: while man, the citizen, and their rights, at all times, have been the subjects of the political; now it is the time to give the central role to the unrepresented in the nation-state (Nail, 2018).

Arendt argued more than sixty years ago that the Rights of Man is indeed the manifestation of indeterminateness and inconclusiveness. What Arendt argued, in addition, was that the idea of human rights originated in the eighteenth century declarations has proved Burke’s criticisms right (Verdirame, 2013, p. 6). The idea natural rights tradition that laid rights arise from inside human beings and transpire only between them is deficient. In fact, “[t]he right ... [that] was never even mentioned among the human rights cannot be expressed in the categories of the eighteenth century”: that right is the “right to have rights” (Arendt, 1979, p. 297). To Arendt, the individual and the political community are intertwined: a theory of individual liberty cannot be abstracted from the political community (Verdirame, 2013). When one is deprived of membership in such political community, i.e. of a “right to have rights,” as Arendt argued, human rights become at stake. Therefore, human rights purport nothing more than citizenship rights; they indeed need to be guaranteed in a politically organized community.

In their respective works, Agamben, Rancière and Balibar too criticize the perplexities of the Rights of Man. In *Homo Sacer*, Agamben presents a biopolitical analysis of human rights for the question of the Rights of Man (Larsen, 2013). To Agamben, the refugee is the figure who poses challenges to the universality promised by the “nation-state-territory” trinity and by the unity of this trinity (Nail, 2018). That is why, as Agamben argues, authorities deny and curtail rights by creating specimens of human life that do

not qualify as human (i.e. mere life) or that are not worthy of living (i.e. not qualified meaningful life) (Larsen, 2013; Schotel, 2013, p. 72). “As long as there will be some kind of sovereign power there will be bare life and states of exception” (Schotel, 2013, p. 73). To Larsen (2013), Agamben’s conceptualization of bare life or “life not worth living” is intertwined with the deprivation of rights. Therefore, “the juridico-political decision upon the value of life ... coincides with the decision upon political exclusion” (Larsen, 2013). This political exclusion in fact results in the political action and resistance of the most political, i.e. the refugee, the stateless, the inmates of the camps (ibid.).

On the other side, Rancière presents a reading by combining Agambenian biopolitical analysis and the Arendtian critique of the Rights of Man. In “Who is the subject of the Rights of Man?”, Rancière suggests that the result of Arendt’s distinction between public realm (*polis*) and private realm (*oikos*) is the suspension of politics as suggested by Agamben (Larsen, 2013). Rancière reaffirms the Arendtian critique that the loss of citizenship rights is the manifestation of the lack of human rights. In this regard, he understands the Rights of Man in the way that they are either void or a tautology (Rancière, 2004). This means that when the subject of the Rights of Man is the non-political (i.e. the refugee, the stateless, the *sans papier*), the Rights are tantamount to nullity (Larsen, 2013). When the citizen is the subject of the Rights of Man, then the Rights amount to a tautology as the Rights of Man are already afforded to the citizen as citizenship rights (ibid.).

Lastly, Balibar’s perspective on the Rights of Man implies equivocalness of this phenomenon. He discusses that the Rights of Man are somewhat congruent to the Rights of the Citizen (Balibar, 2013, p. 18). As he argues, rights are neither moral nor juridical but *insurrectional* (Balibar, 2013, p. 25). As a result, rights are political, but both political and “impolitical” aspects are intertwined (ibid.). Therefore, to Balibar, the political has the primacy in the construction of rights. Balibar’s reading in this sense also reminds us Agamben, inasmuch as the exclusion of the most political indeed gives rise to its politicization, i.e. to political action and resistance. This aspect also goes hand in hand with the Arendtian “right to have rights,” in which the word “to have” implies the endeavor of the refugee and of stateless persons to claim their rights through action and opinion in a politically organized community.

2.2. Why a “Right to Have Rights”?

Since 1990s, scholars, politicians, human rights advocates and activists, especially with regard to the rights of migrants and refugees, have been referring to the Arendtian criticism of human rights (DeGooyer et al., 2018) by attempting to understand the contemporary phenomena, including the migration crisis which took place before the eyes of the millions in 2015. Despite the significant developments in international law with regard to human rights, and particularly the rights of refugees, after Arendt coined the “right to have rights” in 1951 in *The Origins of Totalitarianism*, the refugee is still deprived of a “right

to have rights” due to the challenges posed by the states’ sovereign rights. Hence, while the refugee protection still remains predominantly in the sole discretion of states, which are reluctant to provide such protection, the refugee’s efforts to claim and enjoy his or her rights are also obstructed by states.

The plight of the refugee, therefore, cannot be explained by the traditional human rights theories. Neither a natural rights theory which predicates the origin of human rights on God’s ordainment or on humans, nor liberalism which imposes liberal values as universally accepted values cannot expound the refugee’s rightlessness. When humans do not recognize the rights of other humans *qua* humans, or when there is no society left to acknowledge the rights of those who lost their homes, we come to understand that human rights are indeed tantamount to citizenship rights. Although today the major challenge of the refugee is not the deprivation of citizenship, but access to state territories, to asylum procedures or to a juridico-political status, and to some kind of organized community in the countries of destination (see *CHAPTER IV* and *CHAPTER V*), the plight of the refugee remains to be being “expelled from the human community” (Arendt, 1979, p. 298). This is because the limitations imposed by states against the refugee’s right to claim other rights in fact deprive the refugee of access to a “right to have rights.”

On the other side, Agamben, Rancière, Balibar, and other contemporaries pose overly intensive philosophical and abstract discussions on the concept of human rights. In addition, the understanding that one’s deprivation of membership in an organized political community renders other rights at stake as one is deprived of the capacity to act politically (which only comes with citizenship rights) is presented in a more congruous manner by Arendt, together with the historical roots of the concept of human rights. That is why she offers more for the juridico-politico-philosophical-historical nexus for the one and only right, which is the “right to have rights.” Therefore, the Arendtian “right to have rights” enucleates the plight of the refugee by providing deeper conceptual insights accompanied with well-grounded historical, political, philosophical and juridical discussions. Drawing from the concepts of citizenship and human rights, as well as from the “state-people-territory” trinity, Arendt strikes the right note when explaining why the refugee is still deprived of a “right to have rights” in an age of rights.

Hannah Arendt’s critique of human rights is targeted both to the insufficiency or the lack of an institutional mechanism ensuring and protecting human rights at her time, and to the ambivalent nature of human rights as a theoretical concept which has fallen short to explain the contemporary phenomena that human beings encounter (see *Section 2.3* below). In “The Decline of the Nation-State and the End of the Rights of Man” in *The Origins*, she reproaches how the international system failed to protect the rights of the stateless (i.e. stateless persons and refugees) once they lost the “right to have rights,” i.e. the protection stemming from their citizenship in nation-states, and could have never gained nor invoked that protection elsewhere. That had been the time when people realized “the existence of a right to have rights” (Arendt, 1979, p. 296-297; Benhabib, 2004, p. 51; DeGooyer et al., 2018; Hirsch & Bell, 2017, p. 424), and the

significance of being a member of a political community where one appears before others in a place where one's actions and opinions matter (Arendt, 1979). The deprivation of a “right to have rights,” hence, is the most poignant losses of all: one loses voice, the capacity to act, appearance before others, thus all the humane features that a human being possesses in the public sphere, and that makes a human being *qua* human.

As Arendt argues, such loss also displays the nature of human rights – which were promulgated inalienable and natural as in the rights declarations of the eighteenth century; and universal as in the UDHR in 1948. Rights which are deemed inherent, inalienable and universal may be at risk, merely because one loses the “right” to have rights. In fact, rights require the specific “right” in order to be duly and fully enjoyed: a right which does not stem from the individual Man himself, nor from a divine command, but from the plural humanity itself. Therefore, that right is the prerequisite of other rights, a right without which one is a “human nothing but human”: it is the undeclared “right to have rights” (idem, p. 297).

2.3. The “Right to Have Rights” *qua* the Right to Membership in a Political Community

In *The Origins*, Arendt makes it explicit that the deprivation of a place in the world signals the fundamental deprivation of human rights, as one is primarily deprived of a “right to have rights,” or the right to membership in a political community (Arendt, 1979):

“The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. ... They [the stateless] are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion. ... We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.” (idem, pp. 296-297)

As a former refugee and a stateless, Hannah Arendt observed, at firsthand, how it is to be deprived of rights. When she had to flee to France in 1933, to Portugal, and to the United States by getting a Nansen passport¹⁰ in order to reach safe soils; she had been deprived of her home and became a refugee (DeGooyer et al., 2018). When she was expelled from citizenship through mass denationalization practices imposed by the Nazi Germany, she then became stateless in 1935, and subsequently became rightless (ibid.). She could eventually become the citizen of the United States (ibid.) – which enabled her to access to some kind of organized community where she could enjoy certain set of rights. In this respect, there have been reasonable

¹⁰ In the interwar period, Nansen passport was the only way for refugees and stateless persons to prove that they indeed lost the legal protection in their countries of origin (Gatrell, 2017). With this passport, which had been issued by the League of Nations as an officially recognized document among the international community, refugees and stateless persons could travel without their national passport (ibid.). However, the number of the stateless protected with this document and the protection provided to them fell short of the necessities of the era.

grounds for Arendt to direct harsh criticisms vis-à-vis (1) the practice of human rights, i.e. the human rights protection regime in her era, and (2) the theory of human rights, i.e. the incapability of traditional human rights theories to explain the “right to have rights.”

2.3.1. The Decline of the Nation-State

Arendt’s escape from persecution and search of a new home coincided with the epoch after the establishment of new nation-states in Europe in the interwar period, and the two world wars, which devastated the European continent as a whole. During the post-World War I era, hundreds of thousands of people encountered mass denationalizations and denaturalizations by the totalitarian states and emerged as minorities, stateless persons, and refugees – i.e. the most poignant groups of people – without a place, without state protection, and the most important of all, without rights (Arendt, 1979, p. 278; Benhabib, 2004, p. 67; DeGooyer et al., 2018). This is because “no authority was left to protect them and no institution was willing to guarantee them” (Arendt, 1979, p. 279). Indeed, apart from “reciprocal agreements and treaties between sovereign states” at the time Arendt coined the “right to have rights” (Arendt, 1979, p. 298), the lack of an international regime ensuring the rights of individuals losing protection in their countries of origin demonstrated both the state-centric nature of the human rights protection regime, and the tension between state sovereignty and human rights (Benhabib, 2004, 2012).

The first rightless group, minorities, were the citizens of the countries they lived in; however, they did not feel belonging to those within the dominant national culture (ibid.). They become minorities as the political majority enunciated that they do not belong “the supposedly ‘homogeneous’ people” (Benhabib, 2004, p. 55). To Arendt, minorities “were officially recognized as exceptions” and “specially protected by minority treaties” in considerable numbers (Arendt, 1979, p. 271). “[W]ithout their own national government [they] were deprived of human rights” (idem, p. 272). Therefore, their protection was left to the League of Nations – which, however, was composed of statesmen (ibid.). Indeed, the protection of minorities from the totalitarian nation-states was in the hands of an organization consisting of the representatives reflecting the national interests of their countries.

The creation of millions of refugees and stateless persons following World War I and World War II generated even more perplexity with regard to the rights of the most poignant groups of people. Once minorities were repatriated and stripped of their citizenship by nation-states, they amalgamated with the other most poignant group of people: the stateless (idem, p. 276). The stateless was the most vulnerable among these two – he or she had been deprived of any citizenship rights through the denationalization practices of the nation-states (DeGooyer et al., 2018). This is because “Man ... can lose all so-called Rights of Man without losing his essential quality as man, his human dignity” because of “the loss of a polity” (Arendt, 1979, p. 297). The stateless was indeed “stripped to [his or her] bare status as members of the

human species” (DeGooyer et al., 2018), in Gündoğdu’s (2015, p. 115) words, to “their bare humanity.” Following such deprivation, they became “human nothing but human” (Arendt, 1979, p. 297), hence a mere subject of biopolitics as Agamben and Rancière described (Rancière, 2004, p. 300). As a result, minorities and the stateless, who suffer from being a state of exception within a government or from the lack of a government ensuring and protecting their rights, have been situated “outside the pale of law” (idem, p. 277).

In *The Origins*, Arendt makes it clear that statelessness denotes both to *de jure* statelessness and *de facto* statelessness. While *de jure* stateless is the stateless persons who are recognized by a nation-state, *de facto* stateless is “identical with the refugee question” since their non-recognition through repatriation and deportation has become a widespread practice (Arendt, 1979, p. 279). To Oudejans (2014, p. 21), drawing a sharp line between being a refugee and being a stateless is crucial. That *de facto* statelessness is tantamount to the non-recognition of the refugee as a stateless makes the situation of refugees even more unacceptable (Arendt, 1979, p. 281; Oudejans, 2014, p. 21). While statelessness can be resolved by the acquisition of nationality, the problem of refugee cannot be overcome as it is not a legal, but a political matter (Oudejans, 2014, p. 22). It is presumed by the receiving country that the refugee has ties with a former country where he or she can be returned. However, the situation in the refugee’s country of origin prevents him or her from returning home to evoke and exercise the rights as a national in the home country (ibid.) since a refugee is someone who is forced to flee his or her country and who is thereby deprived of citizenship rights (Arendt, 1979; Cotter, 2005) (see further in *Section 2.4* below).

The second stage of losing a “right to have rights,” therefore, results in absolute rightlessness, and drives the stateless outside the pale of the law. The stateless is “the anomaly for whom the general law [does] not provide” since the stateless lives outside the jurisdiction of the laws in the receiving countries (Arendt, 1979, p. 286). For Arendt, the poignancy of the stateless is not that they are deprived of their rights, but that they no longer belong to any political community; or “not that they are not equal before the law, but that no law exists for them” (idem, p. 295-296). In this respect, even slaves or criminals have a place in and belong to a community that keeps them “within the pale of humanity” (idem, p. 297). By contrasting being a criminal and being a stateless, Arendt (1979, p. 286) strikingly argues that “[a]s a criminal even stateless person will not be treated worse than another criminal” – that is the only way the stateless can be recognized before the law and by others. The stateless – who was under detention just because his or her presence in the receiving country, who faced the threat of deportation, or who has been transferred to a refugee camp – may be treated almost like a citizen because of a trivial crime (ibid.): that is the only time he or she becomes visible to others (Bohman, 2012, p. 330).

On the other side, today even if a nation-state does not safeguard human rights, the international community can take care of the protection of these rights. It is true that considerable developments in international law, especially with regard to human rights, have taken place in the last century and are deemed

to fill the protection gap existed in international law (Hirsch & Bell, 2017). As Benhabib (2004) discusses, in response to mass denationalizations and denaturalizations after World War I, the League of Nations provided legal protection for those who lost their citizenship. In addition, national sovereignty is increasingly constrained by international legal norms, and these norms are increasingly being interpreted in a more universal manner – by international NGOs, judiciaries, and citizens (Benhabib, 2004, p. 68). Several international treaties, including the Refugee Convention, the ICCPR, and the CAT, as well as regional human rights conventions including the ECHR were adopted with the provisions prohibiting the Contracting States, in any manner, from *refoulement*. The scope of “refugee” in the Refugee Convention has been expanded,¹¹ the UNHCR was established to provide international protection, and further developments in the system of international refugee protection led to the inclusion of individuals (*idem*, p. 69). In addition, Article 14 of the UDHR recognized the right to asylum as a universal human right. Even “a sphere that is above the nations [which did] not exist” (Arendt, 1979, p. 298) at the time Arendt coined the “right to have rights” now exists with the establishment of the EU and the ECtHR to, *inter alia*, enhance the protection of human rights within their respective geographies.

Despite these massive developments, however, the *structural and physical boundaries* set by nation-states due to the ever-existing gaps in international law delimit the implementation of their obligations under the international and regional treaties, as well as the enjoyment by individuals of their rights. Indeed, today “[t]he primary conflict is between the liberal democratic commitment to universal individual rights, on the one hand, and the claim of the liberal democratic state to national sovereignty, on the other” (Cotter, 2005, p. 96). Although with the developments in international law in the twentieth century the Westphalian understanding of sovereignty went beyond the understanding that states have the exclusive sovereignty and control over their own territories, states remained to be unwilling to allow the non-citizens, especially those that are deemed illegal, to access to their territory, to asylum (procedures) or to a durable juridico-political status, and to some kind of organized community in their territories. In fact, “sovereignty is nowhere more absolute than in matters of ‘emigration, naturalization, nationality, and expulsion” (Arendt, 1979, p. 278). As a result of the gaps in international law, states have persistently upheld their sovereign rights over human rights (especially the rights of those who are non-citizens), and particularly over the “right to have rights.”

On the other side, in spite of the developments in international law in the last century, the right to have rights cannot be guaranteed by a world state or another world organization (Arendt, 1979, p. 298), nor by international law, which is still operated by reciprocal agreements and treaties between sovereign states (Arendt, 1979; DeGooyer, 2018; Klabbers, 2012). Despite Arendt’s distrust in the nation-state system, she

¹¹ However, some Contracting States of the Refugee Convention did not comply with the expansion of the description of a refugee. For instance, Turkey has retained the geographical reservation under the Refugee Convention, wherefore does not recognize non-Europeans as “convention” refugees. This is discussed in *CHAPTER IV* and *CHAPTER V*.

was equally skeptical towards a so-called world state (Benhabib, 2012, p. 202). Rather than proposing a supra-state citizenship as a solution to the perplexities of the concept of human rights in *The Origins*, Arendt considers that human rights can be enjoyed only in a nation-state (Bohman, 2012, p. 321). This is because “the rights which we enjoy spring ‘from within the nation’” (Arendt, 1979, p. 299). Since the lacuna regarding the assurance of a right to have rights cannot be fulfilled by establishing a world government, the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself (Arendt, 1979, p. 298; Besson, 2012, p. 335; Klabbers, 2012, p. 245). Therefore, it is the citizenship, the only “recognized tie with humanity,” within a state enables human beings to enjoy their rights (Arendt, 1979, p. 300). At the same time, it is the state which delimit the enjoyment of individuals of their human rights through depriving them of a right to have rights.

2.3.2. The End of the Rights of Man

The Arendtian “right to have rights” was also aimed at the theory of human rights, i.e. the incapability of traditional human rights theories to explain the right to have rights. That millions of people emerged in the interwar period and due to World War II having lost the protection in their countries proved that the Rights of Man was unenforceable “whenever people appeared who were no longer citizens of any state” (Arendt, 1979, p. 293). With the emergence of these groups of people, the concept of human rights was in fact tried out (DeGooyer et al., 2018). That had been the time also when “[w]e became aware of the existence of a right to have rights” – the guarantee of which must be humanity itself (Arendt, 1979, p. 297).

In *The Origins*, Arendt (1979) describes nationality or citizenship as a “recognized tie with humanity.” In other words, the right of humanity, or the term “right” in the right to have rights, entitles us to become a member of civil society which bestows us other rights (Benhabib, 2004). Therefore, the right to citizenship, or the right to belong to an organized community in a nation-state, is the right that conditions the possibility for the obtainment of other rights (Gündoğdu, 2015, p. 21): it is the *conditio sine qua non*. According to a legal theorist, Frank Michelman, in coining the notion of a “right to have rights,” Arendt “was investigating the conditions for holding other rights,” a prerequisite of which is an abstract right of political membership (Michelman, 1996, as cited in Moyn, 2018). In DeGooyer’s (2018) words, the right to have rights is “a means by which to possess a right—a kind of ‘super right’ or ... an ‘acquisition right.’” Hence, the precondition for the claim and enjoyment of other rights as a citizen is the first “right” in the Arendtian “right to have rights” – which one loses at the time when one loses the membership in a particular political community (Besson, 2012, p. 339; DeGooyer et al., 2018).

Some scholars assert that the right to have rights is in fact universal moral claims, rather than the capacity to claim rights as a citizen of a nation-state. To Benhabib, the right to have rights “means the recognition of the universal status of personhood of each and every human being independently of their

nationhood” (Benhabib, 2004, p. 68). She posits the Kantian understanding of rights as moral claims that every human being is free, and has rights simply by being “a member of the human species,” (Benhabib, 2004; Hunt, 2018). In this respect, she argues that “each human being *qua* human being as a person [is] entitled to basic human rights and not because they are a national or a citizen” (ibid.). Hence, human rights are ought to be bestowed to human beings merely because they are human beings, and whether or not they possess the citizenship of a certain state.

However, in the *status quo* world order, one must first be a citizen of a state, or possess a right to be a member of a political community in order to claim and enjoy other rights (DeGooyer et al., 2018). In this regard, human rights indeed need to be guaranteed in a particular political institution to be duly and fully enjoyed. This is because one cannot think of human rights “independent of all specific political statuses and deriving solely from the fact of being human” (Bohman, 2012, p. 324). Even when people survived the extermination camps, and became the inmates of concentration and internment camps in the interwar period; rather than falling into the danger of “the abstract nakedness of being nothing but human,” they “desperately” held on to their former nationality, from which once their rights emanated – the only remnant of the fact that they once belonged to a political community (Arendt, 1979, p. 300). Unlike what is stated in the human rights declarations and documents in the Enlightenment – that human beings have rights simply by virtue of being human – what Arendt (1979) argued was that they must also be members of a political community, a citizen of a nation-state. In this regard, what can be read from the Arendtian critique of human rights is that it is not membership in the human species, but it is the membership in a political community, that designate who is a subject of the right to have rights (Arendt, 1979).

If one is deprived of the claim and enjoyment of his or her rights when he or she loses the juridico-political status or the membership in a political community, then why have human rights been proclaimed as universal, inalienable or inherent for many centuries? In ‘The Perplexities of the Rights of Man’ in *The Origins*, Arendt (1979, p. 293) averred that the reason the Rights of Man were declared *qua* natural, inalienable and universal was because they were deemed to be independent of all governments, and supposed to be independent of citizenship and nationality. However, the paradox of contemporary politics is insisting on regarding human rights as inalienable and universal (Cotter, 2005, p. 96). Indeed, rights are enjoyed only by the citizens of certain states, and can only be enforced within and by states (Arendt, 1979, p. 279). If the Rights of Man really existed, they would have been available to all human beings simply because one is a member of the human species, and regardless of one’s membership in a political community or citizenship status (Cotter, 2005, p. 96-97). For instance, despite its promise of universality, human rights cannot be enjoyed by migrants, particularly those who are considered to be in irregular situations, to the same extent as they are enjoyed by citizens (Błuś, 2013, p. 413). Hence, although human rights are manifested *qua* inalienable and inherent, as well as ought to encapsulate all human beings regardless of their citizenship

status; they “must be politically enacted, recognized, and affirmed in particular institutions, orders, and communities” to find stable guarantees (Gündoğdu, 2015, p. 4). This means that human rights are political artifacts, or “political practices” as Gündoğdu (2015) suggests, such that they can be enjoyed only through the assurance in a nation-state.

If it is the case that citizenship or the right to belong to some kind of an organized community as the precondition to access to other rights, then the ones losing a right to have rights, or their juridico-political status in a state, may be deprived of human rights. This means that the “loss of national rights [is] identical with loss of human rights,” as the former leads to the latter (Arendt, 1979, p. 292). As Gündoğdu (2015, p. 3) and DeGooyer (2018) rightly argue, Arendt’s critique highlights how the effective guarantees and protection human rights offer depend on membership in an organized political community. Therefore, when one is deprived of citizenship, i.e. of a right to have rights, he or she may lose all rights stemming from the citizenship status in the country to which he or she was once connected through a legal tie.

As human rights offer no special protection unless one is a member of an organized political community, then they are mere abstractions. Burke argued in his book *Reflections* that “human rights are ‘abstractions,’ mere puffs of words” (DeGooyer, 2018; Hunt, 2018) as the only genuine rights are the rights of citizens, the rights attached to a national community (Rancière, 2004, p. 298). To Burke, “the rights of Englishmen” was affirming the rights belonging to the citizens of England, and “not to human beings in general” (Hunt, 2018). Similar to Arendt’s and Burke’s critique of the Rights of Man, where they aver one has rights on account of the right to citizenship, i.e. membership in a political community; in ancient Greece, equality was conceived *qua* a socially constructed phenomenon. Indeed, “[w]e are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights” (Arendt, 1979, p. 301; Hunt, 2018). Similarly in *On Revolution*, Arendt sheds light on the Greek political thought that men were equal not by nature, but only an artificial institution, the *polis*, would render them equal. In the Greek *polis*, all men received their equality by virtue of citizenship, not of birth. Hence, neither equality nor human rights can be understood “as a quality inherent in human nature,” they are the “qualities of the man-made world” (Arendt, 2006, p. 20-21); they are human artifice.

This indicates how fragile and dependent human rights are: They are fragile, and not inalienable, because despite the international community, they may be taken away by states at their sole discretion and by virtue of their sovereign rights. This also demonstrates that the guarantee of human rights is indeed not God’s revelation or human beings, but a political community. They are dependent, and not universal, because they can only – although not perfectly – be guaranteed and protected by virtue of citizenship, or membership in a political community, within states. Once one is deprived of his or her political status, in other words, of a state ensuring and protecting rights, he or she becomes homeless, stateless and rightless – all at the same time. In fact, one loses a right to have rights – a right that enables him or her to claim other

rights in a politically organized community. Although human beings are deemed to be entitled to rights merely because they are human beings (Benhabib, 2004), and human rights have been designated as inalienable and universal for centuries; when there is no other human being recognizing the rights claimed by a human being, or no authority guaranteeing these rights, then human rights do not mean anything more than citizenship rights. Therefore, once one is deprived of a right to have rights, or the right of every individual to belong to humanity, he or she is regressed into his or her bare humanity where he or she suffers from “the abstract nakedness of being human and nothing but human” (Arendt, 1979, p. 297).

2.3.3. The Perplexities of the Rightless: The Loss of Membership in a Political Community *qua* the Loss of Opinion and Action

The protests against Trump’s travel ban in 2017 (Maxwell, 2018) and the protests of Syrian refugees against the measures taken by Turkish authorities vis-à-vis refugees in 2015 (*Cumhuriyet*, 2015) remind us people’s fight for the right to have rights, in Arendt’s words, “to live in a framework where one is judged by one’s actions and opinions” (Maxwell, 2018). Refugees and stateless persons claim their rights through endeavoring to act and speak: “[t]hey are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion” (Arendt, 1979, p. 296).

In *The Origins*, Arendt argues that the loss of membership in a political community brings the loss of a place in the world where one’s actions and opinions are meaningful, and entails the loss of human rights. When people realize the existence of a right to have rights, and the significance of being a member of a political community, they also conceive the fact that one must appear before others and that one’s human rights can be recognized only in a place where actions and opinions matter. Hence, the right to have rights harbors both the performative and affirmative aspects: it requires the active involvement of the individual in a given political community where he or she demands rights (i.e. appearance), and the acknowledgement by such community who ensures and protects these rights (i.e. recognition). That is the essence of a right “to have” rights: without these aspects, one becomes nothing more than a human being.

When Arendt’s political thought is taken together, it signals us that appearance before others through membership in a political community indicates freedom. As she explains in *On Revolution*, the actual content of freedom is participation in public affairs, or admission to the public sphere (Arendt, 2006, p. 22). To Arendt (1961, p. 146), the reason of existence of politics is freedom, and its realm of existence is action. Without freedom, neither action nor politics could have been realized (ibid.). Action and politics are the capabilities bestowed to man – without freedom, we could not even conceive them (ibid.). “Freedom, ... which – in times of crisis or revolution – becomes the direct aim of political action, ... is actually the reason that men live together in political organization at all” (ibid.). Political participation in and appearance

before others in a common world, therefore, are essential for one's realization of human rights. This common world is the only place where one's action and speech are meaningful as a whole.

Therefore, to Arendt, "to act" is "the capacity to do" (Arendt, 1998, p. 177; Arendt, 2006) – this is conditioned by one's belonging to and membership in a politically organized world, or in the public realm. It is "the sharing of words and deeds," or of speech and action, which creates the public realm; and it is this public realm which enables the sharing of these words and deeds (Arendt, 1998). She explains in *The Human Condition* that action not only has the closest relationship to our common public world, but it is also the activity constituting it (ibid.). In other words, action both conditions and threatens a political community; it makes it both possible and impossible at the same time (Barbour, 2012, p. 311).

In the ancient world, the *polis* as the political organization was created by acting and speaking together, by "human togetherness" (Arendt, 1961, p. 148; Arendt, 1998, p. 179). The *polis*, the space of appearance where one explicitly appears to others as others appear to the one, does not exist for the slave or the foreigner (Arendt, 1998, p. 198). It is this interrelation between acting and speaking in the public realm that enables one's appearance in the common world. Without acting and speaking, one is literally dead to the world, as he or she is no longer lived among others (Arendt, 1998, p. 176; Rancière, 2004). Indeed, it is one's free deeds and living words in the *polis*, i.e. in their common world, that enable him or her to bear life's burden and "could endow life with splendor" (Arendt, 2006, p. 273). Therefore, deprivation of a common world, i.e. disappearance of freedom, means to be deprived of the capacity to act and of one's appearance before others through membership in a political community (Arendt, 1998, p. 198). This is because action is never possible when one is isolated and deprived of the capacity to act, and the public realm exists only when humans live together in the web of human relationships and "together with [their] equals and only with [their] equals" (Arendt, 1979; Arendt, 1998). This "deprived life" or "abstract life" or "bare life" is ensnared in its passivity; far from action, speech and appearance before others (Rancière, 2004, p. 298). Hence, being excluded or expelled from a political community leads to one's deprivation of the capacity to act; of speech and of action. This deprivation can only be prevented with a politically guaranteed public realm.

As Arendt hints in *The Origins*, appearance before a community in a politically organized world *per se* is not enough for the claim and enjoyment of human rights. In this regard, the recognition of one's existence in the political community, and of his or her rights is essential. As DeGooyer (2018) asserts, the performance of a right to membership in a political community requires an audience that recognizes and validates one's claim of belonging. For individuals to be able to have rights, their rights must be recognized, respected, and enforced by others organized in a political community (Hunt, 2018). This idea is similar to the one in the Greek political thought in that the interconnection of freedom and equality emanates from human activities – which can only be visible when they are seen, judged and remembered by others (Arendt,

2006, p. 21). Without the surrounding presence of others, action and speech, the essence of the performance of human rights, cannot be realized (Arendt, 1998, p. 188).

One's vanishment in the space of appearance and the deprivation of one's rights can only be prevented with a politically guaranteed public realm – a realm which acknowledges one's rights. "Politically ... it is the task of good government and the sign of a well-ordered republic to assure [public freedom] of [its] rightful place in the public realm" (Arendt, 2006, p. 271). To Benhabib (2004), in order to be acknowledged as a rights-bearing subject, one's membership in a political community must be recognized by humanity itself. Such recognition is a reciprocal duty of the members of a political community to one another (ibid.). This understanding of reciprocal obligation emanates from Kant's moral law, which legitimizes "the right to be treated by others in accordance with certain standards of human dignity and worthiness," and imposes negative and positive duties – a reciprocal obligation – upon humanity (idem, p. 59). When acting and speaking, humans engage in rights claim – which results in the establishment of reciprocal obligations on each human being to recognize existence and rights of others in a given political community. To Kant, recognition of one's rights involves a reciprocal obligation. Whereas to Arendt, possession of rights "suggests a triangular relationship between the person who is entitled to rights, others upon whom this obligation creates a duty, and the protection of this rights claim and its enforcement through some established legal organ, most commonly the state and its apparatus" (idem, p. 57). Hence, one's rights and existence in the public realm must be recognized by an external power, such as a nation-state (DeGooyer, 2018). It is the nation-state which must recognize, safeguard and enforce the rights of individuals within its territory; and it is the whole humanity within a given political community which must acknowledge the rights of others.

2.4. The "Right to Have Rights" *qua* the Right to Asylum

In an age of migration, the right to citizenship is not the only precondition right to claim and enjoy other rights. Hence, the "right to have rights is at least about 'juridical personhood' within a State" (Bohman, 2012, p. 333), a juridico-political status, which enables individuals to access to other rights in some kind of organized community. In this connection, this section examines that since the right to asylum entitles the refugee to access to a particular organized community in the countries of destination, where they can claim and enjoy other rights; it may in fact be considered the refugee's "right to have rights."

To Arendt, the deepest condition of absolute rightlessness is being a refugee. The refugee is no longer able to rely upon the governments to demand the set of rights as a citizen and fled his or her homeland to seek refuge in a country he or she could reach (Hunt, 2018). Article 1 of the Refugee Convention defines the term "refugee" as someone who has been forced to flee his or her country owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group; and is unable to return to and to receive the protection of that country. For Arendt (1979), the

definition of refugee involves the loss of a legal status as a citizen. It involves the state of being expelled from one's country and thereby the deprivation of one's citizenship rights (ibid.). Hence, when a refugee loses the right to have rights, he or she also loses the membership in a political community where his or her opinions and actions matter, as well as the claim of the rights arising from citizenship status in the country of origin becomes almost impossible. The refugee, therefore, not only seeks for protection, but also for a place where he or she enjoys rights in the safe soils he or she reaches (Oudejans, 2014), and where his or her opinions and actions are recognized.

For an asylum seeker to be granted the status of being a refugee, he or she must be present in a state territory. However, the refugee's rights claim in the destination state may be countered by the sovereign rights of such state over its territory and borders with the disallowance of the refugee's entry to such territory. As a basic rule of international law, states are obliged to respect human rights which arise from their obligations under international conventions only within their territories or jurisdictions. Due to this long-established tradition, it is still the case that this rule is applicable only when the subjects are within the territory or jurisdiction of a state (Hirsch & Bell, 2017). In addition, the provision of refugee protection is left predominantly to the states' sovereign rights, hence remains in the discretion of nation-states. In this regard, the Refugee Convention was considered to compensate the protection gap existed in international law as it imposes the Contracting States the obligation of *non-refoulement* (see *Section 3.3*).¹² Accordingly, states are prohibited from expelling or returning the refugees entering their territories to the countries which would threaten their life or freedom. Although returning the refugee home is one of the most favorable solutions exercised by many states (Oudejans, 2014, p. 23), it contravenes the states' obligation of *non-refoulement* under the Refugee Convention or other international treaties. Thus, states seek to find the remedy to prevent the refugee even before he or she reaches the state territory by precluding his or her access to their territory at the borders or within third countries (see *CHAPTER IV*).

If the refugee (ever) accesses the territory of a state other than the country of origin, he or she demands a juridico-political status which would enable him or her access to some kind of organized community within the country of asylum. Having such status, the refugee will be considered "lawfully staying" or being "durably resident" in that country (Gammeltoft-Hansen, 2011b, p. 28), and not an illegal or irregular migrant who may be expelled from the state territory. This status will eventually enable the access of the refugee also to the rights he or she lost as a citizen in the country of origin. Therefore, in the contemporary world, the "right to (seek and enjoy) asylum" can be considered the refugee's "right to have rights."

On the other side, the right to (seek and enjoy) asylum is not codified in the Refugee Convention itself. As Gammeltoft-Hansen (2011b, p. 24) rightly argues, "[r]efugee protection is not guaranteed in a

¹² This principle was later enshrined in several other international human rights instruments, including the CAT, the ICCPR, and the ECHR, as well as considered as a rule of customary international law.

global homogeneous juridical space, but materializes as a patchwork of commitments undertaken by individual states tied together by multilateral treaty agreements.” In this regard, Article 14 of the UDHR¹³, as well as Article 18 of the CFREU¹⁴ in the EU context, guarantee the right to claim asylum in the countries of destination. Nevertheless, the right to seek and enjoy asylum in the UDHR does not impose substantive obligations on states (Oudejans, 2014, p. 9), as the UDHR remains as a soft law instrument which is explicitly not legally binding on states (Guzman & Meyer, 2010, p. 188). In addition, the right to asylum under Article 18 of the CFREU is linguistically perplexed, and only denotes a procedural right to seek asylum (Oudejans, 2014).

Therefore, a right to asylum in a legally non-binding instrument *per se* is not sufficient to guarantee the refugee’s “right to have rights.” Benhabib (2004, p. 69) argues that while the right to seek and enjoy asylum is recognized as a human right (though in a not legally binding international instrument), the *obligation to grant asylum* too remains as a domestic matter (emphasis added). At this juncture, Benhabib reminds us the Kantian moral law, such that rights claims are “universalist moral claims concerning the obligations we owe to each other as human beings” (idem, p. 66). To Kant, it is the obligation to grant refuge to human beings in need (ibid.). To Arendt, it is the obligation not to overrule one’s membership in a political community nor to disregard the right to have rights (ibid.). As a result, the right to (seek and enjoy) asylum as a rights claim is *ought to* find its reciprocity in the state’s obligation to grant asylum. For the moment, however, there is no such obligation to grant asylum to asylum seekers at international or domestic levels, and granting a refugee status under the Refugee Convention to asylum seekers is left predominantly on the sole discretion of states. The non-existence of the codification of this obligation in a legally binding instrument *per se* generates a gap in international law, as well as endless possibilities for states to make maneuvers in their territories and jurisdictions. As Benhabib concludes:

“... despite considerable developments of international law in protecting the status of stateless persons, as well as of refugees and asylees, neither Kant nor Arendt were wholly wrong in singling out the conflict between universal human rights and sovereignty claims as being the root paradox at the heart of the territorially bounded state-centric international order” (Benhabib, 2004, p. 69).

2.5. Interim Conclusion

Hannah Arendt was a stateless person and a refugee, and encountered at first-hand the difficulties that someone losing the right to have rights and the right to belong to some kind of organized community

¹³ “Everyone has the right to seek and to enjoy in other countries asylum from persecution” (Article 14, UDHR).

¹⁴ “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community” (Article 18, CFREU).

faces. She experienced how perplexed being a stateless, a refugee and a rightless is, and how poignant the inability to regain or evoke these rights from another country is.

Arendt's critique of human rights is aimed both at the insufficiency or the lack of an institutional mechanism safeguarding human rights at her time, and to the intricacy of the concept of human rights which has fallen short of explaining the contemporary phenomena that the stateless encounters. In *The Origins*, she articulates the failure of the international system to protect the rights of the stateless once they were deprived of the protection in their countries of origin, and could have never gained nor beckoned that protection as they lost their membership in a political community, or the right to have rights. At the time Arendt fled persecution in the search of a place where she could claim and enjoy her rights, the totalitarian nation-states revoked the nationality of hundreds of thousands of their citizens in the interwar period. World War II generated even more poignancy by creating millions of refugees and stateless persons who were regressed to their bare humanity. Especially after World War II, there have been significant developments in international law to find effective solutions to the refugee question. However, today the tension still arises from the clash between the sovereign rights of states and human rights. This is principally because of the ever-existing gaps in international law: the non-existence of an obligation to grant asylum under international law, of an obligation to allow the entry of those at the borders to the state territory, and of a right to asylum in a legally binding instrument. These gaps create an immense area of maneuver for sovereign states, and jeopardizes the right to have rights in particular.

The loss of a right to have rights also displays the nature of human rights, which are certainly not inalienable, inherent, or universal in contrast to what had been claimed in various human rights declarations and documents. In fact, it is the nation-state which must recognize, as well as ensure the access of individuals to some kind of organized community within its territory; and it is the humanity within that particular community which must acknowledge the rights of others. That is why human rights are in fact identical with citizenship rights.

As shown in this Chapter, the deprivation of a citizenship status denotes the loss of a right to have rights. That is why the first "right" in the right to have rights is perceived as a prerequisite right, without which no other rights can be claimed or enjoyed. As the right to citizenship, or the right to membership in a political community, is the status which bestows to its bearers to claim and enjoyment of a certain set of concrete rights; it is understood as the right to have rights. Hence, it is the *sine qua non* of other rights. Therefore, just like the notion of equality, human rights are socially constructed phenomena: they are convention and artificial; they are mere abstractions. Without a right to have rights, i.e. the right to citizenship or the right to membership in a political community, human rights cannot be claimed or enjoyed.

As one loses citizenship status from his or her country of origin, he or she also loses a place in the world where his or her actions and opinions are significant, as well as the possibility to claim the rights

emanating from such status. This is because one's human rights can materialize only within a politically organized community – where one's actions and opinions are recognized through his or her appearance in a place in the world. Action, which is the revelation of opinion, is a sign of *viva activa*. The deprivation of action and opinion entails the deprivation of human rights. If one's human rights are not recognized within a politically organized community, his or her existence in the public realm counts for nothing. Therefore, one's appearance before others in a common world is essential for one's realization of human rights, such that humans are visible to the world only through their existence and physical appearance in a given political community.

In today's context, the right to (seek and enjoy) asylum can be deemed as the refugee's "right to have rights," such that the refugee would be bestowed a legally recognized refugee status, or a durable juridico-political status. Such status will enable his or her access to a particular organized community where he or she can claim and enjoy a certain set of rights enshrined in the Refugee Convention and pursuant to other normative guarantees of human rights law.

CHAPTER III

The Law of Human Rights: Certain Safeguards in International and European Law

This Chapter outlines some of the normative guarantees under the UDHR, the ICCPR, the ECHR, the Refugee Convention with regard to the rights to life and to liberty, the prohibition of torture et al., and the secondary rights that may be granted to protection seekers. The idea herein is to present that apart from the right to (seek and enjoy) asylum (see *Section 2.4* above), there are other rights enshrined in the aforesaid international legal instruments for the protection of asylum seekers and refugees when they are present on state territories or jurisdictions. In addition, this Chapter establishes the framework for the examination in *Section 5.1* of the impact of the EU-Turkey Statement on the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands, and in Turkey.

According to Article 11 *et seq* of the VCLT, the provisions of which are also considered as customary international law rules, upon ratification, acceptance, approval, accession or other means expressing the consent of a Contracting State to be bound by an international treaty, such treaty becomes binding over that Contracting State. Therefore, states that ratified the ICCPR, the ECHR and the Refugee Convention undertake to abide by their human rights obligations under those treaties and the supervision of treaty-based mechanisms established thereunder pursuant to their respective provisions.

3.1. The Rights to Life and to Liberty in International and European Law

According to Article 3 of the UDHR, “[e]veryone has the right to life, liberty, and security of person.” Without distinction of a person’s race, religion, nationality, membership of a particular social group or political opinion or otherwise; everyone is entitled to these rights (Article 2, UDHR). As discussed in *Section 2.4*, although the UDHR is a soft law instrument and does not bind the signatory states, the rights enshrined therein are considered also as customary international law rules. Soon after, these rights were codified also in a binding international convention, the ICCPR, in two different articles: the right to life enshrined in Article 6, and the right to liberty in Article 9. While the right to life is a non-derogable right, as no derogations are allowed “even in time of war or other public emergency threatening the life of the nation” (Korff, 2006, p. 6); one can be deprived of his or her right to liberty only upon a decision of arrest or detention and on the ground that such decision is established by law (Article 9, ICCPR). Notwithstanding,

even though a person is deprived of his or her liberty, that person shall be treated with humanity and with respect to human dignity (Article 10, ICCPR).

Apart from international legal instruments, the ECHR too guarantees the rights to life and liberty within the Contracting Parties (who are the members of the CoE). Article 2 of the ECHR recognizes everyone's right to life. Article 5 lays down the right to liberty, and stipulates that a person shall be deprived of his or her liberty only on the ground of his or her lawful arrest or detention. In addition, Article 5 of the ECHR and Article 9 of the ICCPR provide further guarantees for those who are under arrest or detention. Everyone who is arrested or detained shall be informed of the reasons of arrest and charges against him or her (Article 5(2), ECHR; Article 9(2), ICCPR), and shall be provided for remedies to challenge the lawfulness of his or her detention (Article 5(4), ECHR; Article 9(4), ICCPR). Therefore, the right to liberty in European and international law ensures not only the prohibition of unlawful deprivation of a person's liberty, but also sets out certain guarantees that must be provided if a person is arrested or detained.

On the other side, the application of both Articles 6 and 9 of the ICCPR, and Articles 2 and 5 of the ECHR are limited. While the application of the ICCPR is restrained to state territories (Article 2, ICCPR), the ECHR is restrained to state jurisdictions (Article 1, ECHR). In this regard, while jurisdiction goes beyond a state territory, which is a well-established rule also in the ECtHR jurisprudence¹⁵, State Parties presume that they are responsible for ensuring the rights of individuals only when the subjects come under their territory or jurisdiction (den Heijer, 2011; Hirsch & Bell, 2017; Mc Namara, 2013).

3.2. The Prohibition of Torture in European Law

Article 3 of the ECHR prohibits torture et al.¹⁶, but also serves as a safeguard against the poor detention conditions if an individual is deprived of his or her liberty by the state authorities, as well as prohibits the Contracting States of the ECHR from expulsion and return of persons to the countries where their life and freedom would be jeopardized. As Article 3 of the ECHR *qua* the protection from *refoulement* is discussed in Section 3.3 below, this Section presents briefly what further safeguards are provided by Article 3.

Article 3 of the ECHR stipulates that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” As can be interpreted from the wording of Article 3, the words “or” are added to provide distinctive protections against (1) torture, (2) inhuman treatment, (3) degrading treatment, and (4) degrading punishment. If a person as an applicant at the ECtHR is subjected to any of these by a Contracting State, the Court may rule that Article 3 of the Convention is violated. In this regard, inhuman

¹⁵ See for example, *Hirsi Jamaa and Others v. Italy* (ECtHR, 2012).

¹⁶ “Torture et al.” connotes “torture and other cruel or inhuman or degrading treatment or punishment” as described in several international and regional human rights conventions, including ICCPR, CAT, ECHR and CFREU.

treatment involves treatment which purposely causes severe physical or mental suffering on the victim, and many instances arise in the context of detention, where victims are subjected to ill-treatment that does not reach the threshold of torture (Reidy, 2002, p. 16). Degrading treatment, on the other side, causes feelings of fear, anguish, inferiority which may humiliate or debase the victim (ibid.). Those who are deprived of their liberty and under the full control of the state authorities are the most vulnerable to be exposed to inhuman or degrading treatment (idem, p. 22). What must be interpreted from Article 3 of the ECHR, therefore, is that certain safeguards are provided also to foreigners (including asylum seekers and refugees) in a state party, and their rights, including protection from torture et al., shall be respected by the state authorities in the event of (both lawful and unlawful) detention.

3.3. The Prohibition of *Refoulement* in International and European Law

Although the Refugee Convention does not pronounce a right to asylum, the principle of *non-refoulement* constitutes the backbone of the convention and international refugee law (see Section 2.4). The Refugee Convention, the ICCPR, the CAT, and the ECHR involves provisions protecting individuals from *refoulement*. What Article 33 of the Refugee Convention and Article 3 of CAT, as well as (although not directly specified) Article 6 (“right to life”) and Article 7 (“prohibition of torture et al.”) of the ICCPR and Article 3 (“prohibition of torture”) of the ECHR have in common is the strict prohibition of expulsion or return of the individuals (and especially of the refugees) to the countries where they will encounter serious human rights violations.¹⁷ The principle of *non-refoulement* is considered also as a customary international law¹⁸ rule. For this reason, even if a state is not a state party to the Refugee Convention, the ICCPR, the CAT, or the ECHR, it is precluded from *refoulement*. In addition, the prohibition of *refoulement* is considered as *jus cogens*, which is a peremptory norm of international law prescribing that no derogations can be made (Alain, 2001).

According to Article 33(1) of the Refugee Convention, “[n]o Contracting State shall expel or return (“refouler”)¹⁹ a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Hence, states are barred from transgressing the prohibition of *refoulement* “in any manner whatsoever” (ibid.), in other words, from expelling or returning the refugees entering their territories to the countries which would threaten their life or freedom. Similarly, Article 3 of the ECHR is

¹⁷ In Section 5.1, only the provisions of the Refugee Convention and the ECHR are considered.

¹⁸ See footnote 7 about customary international law.

¹⁹ The word *refouler* comes from French, and is used “to describe a more informal way of removing a person from the territory and also to describe non-admittance at the frontier” (Grahls-Madsen, 1963, as cited in den Heijer, 2011, p. 136).

construed as providing protection against *refoulement*, and this must be respected by the Contracting States even when asylum seekers and refugees present themselves at their jurisdiction. Therefore, whether a refugee is in a state territory or not, if he or she is in the jurisdiction of a state; that state is under the obligation of *non-refoulement* pursuant to the ECHR so as not to expel or return to a territory where life or freedom of the refugee would be threatened.

Another crucial point as to Article 33 of the Refugee Convention is that it safeguards refugees from *refoulement* “in any manner whatsoever.” As Article 33 manifests, the wording “in any manner whatsoever” bars states, whether party to the Refugee Convention or not, from directly or indirectly expelling or returning asylum seekers and refugees to the countries where their life or freedom would be jeopardized. Similarly, Article 3 of the ECHR is construed as providing protection against both indirect and direct *refoulement* (UNHCR, 2003, p. 2). As underscored by the ECtHR in *T.I. v. United Kingdom* in 2000, indirect removal of a person to an intermediate country does still impose the responsibility of *non-refoulement* on a Contracting State, such that the Contracting State must ensure that the applicant will not be subjected to treatment in violation of Article 3 of the ECHR (*ibid.*). Likewise in *Hirsi Jamaa and Others v. Italy*, the ECtHR concluded that Italy violated Article 3 of the ECHR as it engaged in direct *refoulement* by transferring the applicants (who were potential asylum seekers) to Libya, where they will encounter torture et al., and in indirect *refoulement* by conniving at the fact that Libya would expel them to their countries of origin.

3.4. The Secondary Rights under the Refugee Convention

When an asylum seeker is granted a legally recognized refugee status pursuant to the Refugee Convention by the country where an asylum claim is lodged, he or she will be bestowed the access to certain set of rights, including the secondary rights prescribed in the Refugee Convention. In this respect, “Articles 2-34 [of the Refugee Convention] grant all kinds of benefits (referred to below also as ‘secondary rights’)” to a legally recognized refugee (Battjes, 2006, p. 9). The secondary rights under the Refugee Convention involve protection against *refoulement* (Article 33) and against discrimination (Article 3), freedom of movement (Article 26), access to a state’s courts (Article 16), the right to benefit from public education (Article 22) and housing (Article 21), and no penalty on the account of illegal entry or stay (Article 31). Thus, the right to asylum in international refugee law encompasses a number of fundamental rights that go beyond the principle of *non-refoulement*, and that can be claimed from the moment when an asylum-seeker enters the state jurisdiction until the attainment of efficient protection status (UNHCR, 2012, p. 6). The precondition for the obtainment of these rights under the Refugee Convention from the state where the protection is sought is the grant of a legally recognized refugee status pursuant to the Refugee Convention.

CHAPTER IV

Deciding “In”, Acting “Out”: The Externalization of Migration Management in the EU and the Turkish Asylum Regime

“It must be remembered ... that public opinion is apt to concern itself much more with the individual who has set foot on the nation’s territory and thus is within the power of the national authorities, than with people only seen as shadows or moving figures ‘at the other side of the fence.’ The latter have not materialized as human beings, and it is much easier to shed responsibility for a mass of unknown people than for the individual whose fate one has to decide.”
—Atle Grahl-Madsen²⁰, *Commentary on the Refugee Convention*

Against the backdrop of the review conducted on the externalization of migration management, the Turkish asylum regime, and the EU-Turkey Statement, this Chapter sheds light on the concept of externalization of migration management, particularly in the EU context, by providing an understanding from the relevant literature. *Section 4.2* gets to the heart of the externalization of migration management in the EU. *Section 4.2.1* articulates the origins of externalization, and broaches the terminology used to define the extraterritorial actions of states to manage migration. *Section 4.2.2* examines the EU’s rationales in engaging in externalization. *Section 4.2.3* illuminates the historical background of externalization in the EU with the pertinent institutionalization process. *Section 4.2.4* sheds light on the interrelation between internal and external dimensions of the EU asylum policy. *Section 4.2.5* scrutinizes the three instruments of externalization in the EU context, respectively *safe third country principle*, *readmission agreements*, and *interception at maritime and land borders* – which are the most relevant in the case of the EU-Turkey Statement. *Section 4.3* examines the EU-Turkey Statement after providing the background related to the Turkish asylum and migration regime which evolved largely under the EU influence, and to the 2015 migration crisis as the driving force behind the conclusion of the Statement.

4.1. On the Externalization of Migration Management

With a long history of being a land of immigration, emigration, asylum and transit, Turkey has been considered as a country of migration (Ataç et al., 2017). Despite being a country of migration, the restructuration of Turkish asylum and migration policies dates back only to early 2000s, after Turkey was

²⁰ The late Professor Atle Grahl-Madsen was a prominent international lawyer who served as a Special Consultant in the Office of the High Commissioner for Refugees between 1962 and 1963 (den Heijer, 2010, 2011; Gammeltoft-Hansen, 2011b).

granted the official candidate status in its accession to the EU. Following the migration crisis in the summer of 2015, Turkey began to become a hub of refugees, most of who flee persecution from the devastating civil war in Syria and aim to access the EU territory through Turkey to be granted adequate protection.

Upon receiving a massive number of migrants throughout the migration crisis (over 1.8 million) only in 2015 – 885,386 of who crossed via the Eastern Mediterranean route (Frontex, 2016, p. 18) – the EU sought to tackle the crisis by cooperating with Turkey with a view to staunching the migratory flows and further externalizing the management of migration even before asylum seekers reach the EU territory. This led to the conclusion of the so-called EU-Turkey Statement of 18 March 2016. Currently hosting in excess of 3.9 million registered refugees – 3.6 million of which are Syrians, and the remaining consists of Iraqis, Afghans, Iranians and Somalis (European Commission, 2019d), Turkey has become the country having the highest population of refugees in the world. While the asylum system in Turkey has come to an impasse as it falls short of providing effective protection to the non-European asylum seekers in the country, the ones who attempt or attempted to reach the EU territory remain to be left behind the borders: with the lack of access to asylum in Turkey, and to the rights emanating from having an unambiguous legally recognized status; and to a right to have rights.

The EU-Turkey Statement is in fact only the tip of the iceberg as to the externalization of migration management in the EU. In fact, from the outset a part of the EU policy and *acquis* on asylum has involved an “external dimension.” Since the early 1990s, the EU sought to cooperate with countries of origin and transit in the management of migration, especially to prevent the access of migrants to the EU territory, while also shaping its internal asylum policy with a view to harmonizing domestic procedures and measures adopted by Member States. The “dirty” deal between the EU and Turkey comprises of most of the instruments of externalized migration management, including readmission of migrants to Turkey, deployment of ILOs in Turkey, as well as training and building the capacity of Turkish coast guards, (albeit not directly referred in the Statement) designation of Turkey as a safe third country, maritime and land interceptions and push-backs by Greece.

As presented in *CHAPTER II*, Hannah Arendt’s thought on human rights remains to be valid. It has become clear that the concepts of state sovereignty, borders, territoriality of human rights protection, and citizenship retain their pertinence in explaining the migration crisis where people had been on the move *en masse* due to war and persecution. They lost the protection in their countries of origin and rights emanating from their citizenship, wherefore they could not enjoy their rights elsewhere. As shown in that Chapter, there is an abundance of works related to the interrelation between sovereignty, territory, borders and the rights of asylum seekers and refugees with the lens of the Arendtian “right to have rights.” Only a few of these works are related to the connection between the externalization of migration management in the EU context, the right of asylum, and the right to have rights (e.g. Hirsch & Bell, 2017; Oudejans, 2014).

On the other side, the literature on the EU's externalization of migration management dates back to the beginning of 1990s. Concomitantly with the proliferation of externalized measures by the EU and Member States vis-à-vis migrants (particularly asylum seekers and refugees) aiming or attempting to access the territories of EU Member States, externalization began to attract further attention in literature from then on, and especially since early 2000s. In other words, there is now a plethora of studies shedding light on "a mass of unknown people" for whom "it is much easier to shed responsibility."²¹ The abundance of the research on externalization – thanks to the latest developments within the EU in the last two decades, including the EU-Turkey Statement – renders conducting this research even more challenging.

What has become manifest in the process of this review is that a large scholarly literature exists singly and respectively also on the effects of the EU's practices externalizing the management of migration on the rights of asylum seekers and refugees, and the EU-Turkey Statement (e.g. its legal nature, as to whether Turkey is a safe third country) – all of which adopt harsh criticisms against policy- and law-making at national level (e.g. in Turkey, or in the EU Member States) or at EU level. A great majority of these scholarly works utilize case-law and policy documents (e.g. from the EU, Greece and Turkey), and some conduct interviews with a view to presenting the lived experience of refugees in Turkey (e.g. Baban, Ilcan & Rygiel, 2017; Heck & Hess, 2017) – but all of which engage in qualitative document analyses.

Following an in-depth literature search on the externalization of migration management in the EU context, and on the EU-Turkey Statement, however, it is found that no comprehensive literature on the influence of the EU-Turkey Statement on the rights of asylum seekers and refugees at the Greek-Turkish frontier, on the Greek islands and in Turkey from the perspective of Arendtian "right to have rights" exists. Although some scholars refer to Arendt in their work, the whole issue is not elaborated from the Arendtian perspective on human rights. Many articles or books bafflingly refer to the right to have rights without contextualizing it with an Arendtian perspective. For instance, Baban, Ilcan and Rygiel (2017) pronounce in their article a right to have rights within the context of insecurities Syrians live through in urban centers in Turkey, but this does not denote an Arendtian "right to have rights." Likewise, although Lemberg-Pedersen's (2015) work on the loss of rights due to the EU's externalization of border control refers to a right to have rights, it does not denote Arendt. Farahat and Markard (2016) also mention a right to have rights in their work where they question the limitation by EU law and international law on the state sovereignty regarding the decisions of states over forced migration, but do not provide an in-depth analysis of the EU-Turkey Statement from an Arendtian perspective. In addition, although there is an ongoing doctorate research on the EU policies towards third countries including Turkey and Libya, and their effects on the status

²¹ The purpose here is to recall the words of Grahl-Madsen (1963). See *footnote 20* above.

and rights of asylum seekers from an Arendtian stance (Reyhani, s.a.), it is unfinished and does not address the specific research questions that this study ponders and aims to elucidate.

4.2. The Externalization of Migration Management in the EU

4.2.1. What is Externalization? A Multiplicity in Terminology

Although the majority of asylum seekers and refugees remain in the countries of the developing world,²² countries of the developed world (i.e. EU Member States, the United States and Australia) have sought to curb migration flows from reaching their territories through adopting various measures to offshore and outsource migration management. As Gammeltoft-Hansen (2011b) argues, offshored and outsourced migration management is not a new phenomenon. Within the EU (formerly the EC), the origins of such measures adopting a “restrictive and control-oriented approach” stem from the inherent continuation of the Europeanization of migration control which has already begun in the 1980s (Boswell, 2003, p. 622). However, even before the EU has begun to prevent migrants from accessing the EU territory, the United States and Australia had been exercising such measures already in the mid-1900s. For instance, the interception of Haitian migrants at sea by the United States in the 1980s, as well as Australia’s rejection of asylum seekers in its territorial waters, and establishment of offshore asylum application processing centers in Nauru raised several criticisms as they disregard human rights of asylum seekers (den Heijer, 2010, pp. 171-172; Ryan, 2010). As a result, unlike the conventional image of the refugee lodging an asylum claim at the time of arrival at the border or within the state territory, an ever-growing number of asylum seekers encounter measures of migration management even before their arrival at a potential destination state (den Heijer, 2010; Frelick et al., 2016, p. 190; Gammeltoft-Hansen, 2011b, p. 231).

Despite the deep-rooted history of externalization, the pertinent literature is not in cahoots when it comes to the terminology of this phenomenon. A great number of varying terms has been utilized in literature with a view to conceptualizing the actions of states beyond their Westphalian borders (Mc Namara, 2013, p. 326) in order to restrict or prevent the migrants attempting to reach their territories. It is regarded by most scholars as “externalization” (e.g. Boswell, 2003; Lavenex, 2006; Spijkerboer, 2017; Triandafylidou & Dimitriadi, 2013), and some as “extraterritorialization” (e.g. Gammeltoft-Hansen, 2011a, 2011b; Ryan, 2010), “remote control” (e.g. Zolberg, 2003, as cited in Lavenex, 2006), “remote migration management” (e.g. den Heijer, 2011), “external relations” and “foreign policy” (e.g. Lavenex, 2006), “external

²² 86 per cent of the 25.4 million refugees stay in the developing world – most of which are the neighbors of the countries of origin (e.g. Turkey, Libya, Morocco) (Frelick, Kysel & Podkul, 2016, p. 192). Whereas rest of them move or seek to move beyond to search further protection and stability in the developed states including the EU, the United States and Australia (idem, 191-192).

dimension” (e.g. den Heijer, 2011; Mc Namara, 2013²³). However, it is clear that the latest and the majority of studies in this field refer to this phenomenon as the externalization of migration control or management. In addition, there has been a paradigm shift in the last decade from “migration control” to “migration management” due to the focus of these practices on the movements of populations, not of individuals (see *Section 4.2.3* below). This study, therefore, prefers the usage of “externalization of migration management.”

4.2.2. The EU’s Rationales behind the Externalization of Migration Management

Scholars in the disciplines of international refugee law and international relations pronounce different rationales of EU Member States, and of the EU in particular, behind their engagement in the management of migration beyond their territories. In fact, many scholars (Boswell, 2003; den Heijer, 2010, 2011; Frelick et al., 2016; Lavenex, 2006; Ryan, 2010), albeit using a different terminology, describe externalization as measures aimed at precluding the entry of migrants (including asylum seekers and refugees) into the EU territory. While externalization is in conflict with the traditional understanding of state sovereignty emanating from the 1648 Treaty of Westphalia (Casas-Cortes, Cobarrubias & Pickles, 2016; den Heijer, 2010; Gammeltoft-Hansen, 2011a), as states act beyond their territories, and on the high seas or within the territory of another state to preclude such entry; migrants are prevented from accessing the EU territory even before they attempt to do so or at the time they are returned to the countries of origin or transit after their arrival at an EU Member State. By doing so, the burden of protection and management is also diverted to the countries of origin or transit. As a result, if externalization is “successful,” it helps the reduction in the burden of management at the immediate borders and raises the possibility of abating undesired flows before they reach the EU territory (Lavenex, 2006, p. 337).

By engaging in the externalization of migration management, the EU in fact acts like a state aiming to protect its control over the EU territory and external borders. Especially when framing and developing a common European asylum policy for the Member States (Articles 67 and 77, TFEU), or when “striking readmission agreements, the EU acts like a state” (Follis, 2012, p. 240). Therefore, the EU is a political entity performing the role of the state in the field of migration in some respects, and particularly by adopting practices and instruments externalizing the management of migration.

In this connection, this study defines the externalization of migration management as direct or indirect state actions beyond a state territory with a view to diverting the burden of migration management and of protection to a third country. It identifies two rationales behind the actions of the EU and Member

²³ Mc Namara (2013) uses the concept of “external dimension” to define an indirect and weaker migration control through incorporation of migration into the EU’s relations with third countries. Hence, he distinguishes the concepts of “external dimension” and “externalization.” See further in *Section 4.2.2.b*.

States embarking on the externalization of migration management: to (1) prevent the access of illegal immigrants (including asylum seekers and refugees) to the state territory, and (2) divert the burden of management and protection through direct or indirect state actions beyond the state territory.

a. *Preventing Irregular Migrants from Reaching the State Territory*

The first of these rationales, the prevention of illegal entry, targets migrants to preclude and reduce their access to the EU territory. To realize this, various externalization tools (see *Section 4.2.5*) are utilized, including the interception of vessels carrying migrants (without checking as to whether they are asylum seekers or refugees) on the high seas and land borders, carrier sanctions, deployment of ILOs, and conclusion of border control arrangements with third countries (den Heijer, 2010, p. 170). As Gammeltoft-Hansen (2011a) states, by virtue of these instruments, migration is managed in every single step of the journey. In addition, with the aim of hindering such undesired migrants accessing the EU, the greatest portion of migration management is diverted to non-EU third countries (e.g. countries of transit and origin) through determining them as safe third countries and/or signing *inter se* readmission agreements (den Heijer, 2010; Frelick et al., 2016; Gammeltoft-Hansen, 2011a, p. 273).

Scholars explain that the rationale aiming to prevent and reduce (irregular) migration is justified by problematic approaches adopted vis-à-vis asylum seekers and refugees. In particular, the aim to minimize additional legal, social and financial costs of immigration leads to the prevention of migrants attempting to reach the EU territory. Since preventive measures, which target the root causes of migration in the countries of emigration, require additional resources, externalization has always been the most desired solution to prevent the access of asylum seekers into the EU territory (Boswell, 2003, p. 635). In addition, “once an (irregular) immigrant reaches the territory of [EU Member States] ..., his or her removal faces significant juridical and societal constraints” (Lavenex, 2006, p. 338). For instance, in the sphere of maritime interceptions, migrants are instantly and forcibly returned to the country of departure soon after they have crossed the border of the territorial sea (den Heijer, 2011, p. 162). Therefore, in order to elude the financial costs, as well as societal and juridical aspects of removing non-admitted asylum seekers and other migrants, including the obligation of *non-refoulement* (den Heijer, 2011, p. 163; Ryan, 2010, p. 35), the EU has been engaging in the externalization of migration management to prevent the access of migrants to the EU territory. That is why externalization has always been justified and preferred over other measures.

b. *Diversion of Burden through Extraterritorial State Actions*

The second rationale of externalization in the EU context involves the diversion of the burden of management and protection to third countries through direct and indirect actions beyond the state territory. In this regard, third countries are engaged or mobilized through the instruments of externalization, whereby

they undertake the responsibility to manage migration and to provide protection to asylum seekers. Although similar to preventive measures externalization involves cooperation with third countries (see *Section 1.3*), the latter merely diverts the burden and locus of management beyond the common territory and outside the external borders of the EU towards these countries (Boswell, 2003, p. 636; Lavenex, 2006, p. 334).

In this connection, scholars draw attention to the interrelation between state sovereignty and the externalization of migration management. As many scholars argue (Casas-Cortes et al., 2016; den Heijer, 2010; Gammeltoft-Hansen, 2011a), the process of diverting the burden to third countries collides with the Westphalian understanding of sovereignty, which presumes that states may exercise their sovereign powers only within their own territory, and that the principle of non-intervention precludes states from acting in the territory of another state (see *Section 2.3.1*). By shifting the responsibility of migration management to third countries, EU Member States rework and extend their traditional borders beyond their territories (Casas-Cortes et al., 2016, p. 232; den Heijer, 2010, p. 170). Through such extension, borders prevent migrants from entering the EU territory (den Heijer, 2010) by focusing on the flows beyond territorial boundaries (Casas-Cortes et al., 2016, p. 232). As a result, the Westphalian understanding of state sovereignty fails to explain externalization, especially when the control is exerted within the territory of another state (den Heijer, 2010). As EU Member States presume that they lack jurisdiction on such an occasion by virtue of the extension of their borders through the externalization of migration management, they also consider that their protection obligations do not extend to migrants outside their territories (Ryan, 2010).

As to the extraterritorial state actions, scholars are divided with regard to their scope. In this respect, some consider that actions of the EU and Member States involving more direct and stronger migration control over the access of an asylum seeker into the EU territory and within third states outside the EU (e.g. carrier sanctions and ILOs) fall within the ambit of the externalization of migration management (den Heijer, 2011; Mc Namara, 2013, pp. 319-327). Whereas actions involving more indirect involvement through external action and cooperation with third countries (e.g. readmission agreements), are deemed in the “external dimension” of the EU asylum policy (den Heijer, 2011, p. 175; Mc Namara, 2013, pp. 319-327). In contrast, Frelick et al. (2016) discuss that the externalization of migration management arises from extraterritorial state actions harboring both direct interdiction and preventive policies, and indirect involvement. While direct actions explicitly seek to prevent the entry of migrants into a destination state, indirect actions comprise of support and assistance to security or management of migration in and by third countries (idem, p. 193-194). This study, too, considers that in all cases, third countries are engaged in the process of migration management, whether direct or indirect, whereby the EU or Member States shift the burden of management and protection to these countries. In this regard, a causal link is involved between the actions of Member States, and the lack of asylum seekers’ access to the EU territory, to asylum procedures and to other rights that may be granted under international law, EU law or domestic laws. This is because there is

no possibility to be granted asylum or to avail of *non-refoulement* for those intercepted on the high seas, or where the EU exerts measures to manage migration in third countries (Gammeltoft-Hansen, 2011a, p. 274).

c. *Killing Two Birds with One Stone?*

All in all, the EU's two rationales concomitantly leading to the externalization of migration management stem from the challenge posed by the refugee to state sovereignty. The nexus between the refugee and migration management has been a point of confrontation between states' sovereign rights and international law, and the territoriality of refugee protection regime has been the evidence of this confrontation (Gammeltoft-Hansen, 2011b, p. 11). As discussed in *Section 2.4*, the traditional understanding of human rights protection assumes that states are obliged to protect human rights only when the subjects come under their sovereignty and jurisdiction (den Heijer, 2011, p. 299; Hirsch & Bell, 2017). In particular, the never-ending discussion over the geographical application of the prohibition of *refoulement* prescribed in the Refugee Convention (Gammeltoft-Hansen, 2011b, p. 40), as well as the non-existence of an obligation to allow the entry of those at the borders, of a binding right to asylum and of an obligation to grant asylum in international refugee law (Gammeltoft-Hansen, 2011a, p. 274) illustrate the gaps in international law. Therefore, these gaps underlying international law incentivize the EU to engage in the externalization of migration management not only to reduce or prevent the access of asylum seekers to the EU territory, but also to shift the burden of management and protection by cooperating with third countries (den Heijer, 2010, p. 170; den Heijer, 2011, p. 298; Gammeltoft-Hansen, 2011b, p. 31).

4.2.3. Towards a "Fortress Europe"²⁴? Externalization as an Intrinsic Part of the EU Asylum Policy

Since mid-1990s, migration management has been among the most major issues in the EU (Triandafyllidou & Dimitriadi, 2013). After the lifting of internal border controls among Schengen states with the 1985 Schengen Agreement, the EU's focus has been shifted towards external borders with a view to controlling migrant influxes (Boswell, 2003, pp. 621-622; Vaughan-Williams, 2015, p. 19) and ensuring "protection in the region" (Gammeltoft-Hansen, 2011b, p. 27). It has been noticed by the EC/EU policy-makers already in the late 1980s and 1990s that "externalization of border control, restrictive asylum systems, and cooperation to combat migrant smuggling and trafficking were the most effective instruments" in realizing the goal of a borderless Europe (Boswell, 2003, p. 623). As a result, the EU (and formerly the EC) sought to tackle (irregular) migration through institutionalizing its asylum policy with the incorporation

²⁴ The term "Fortress Europe" is utilized by many scholars and the media (e.g. Baczynska, 2018; Castan Pinos, 2009; Follis, 2012) to describe the EU's external control controls to restrict or prevent the access of migrants, and how the EU treats migrants through different measures including detention, interception, as well as the EU's cooperation with third countries to shift the burden.

of externalized migration management from the very outset. Now it is explicit that externalization backs up the EU in all aspects of its asylum policy (Frelick et al., 2016, p. 208).

Institutionalization of the EU asylum policy, and concomitantly the externalization of migration management in the EU, have gained momentum especially after the early 1990s. Following the enactment of the 1986 Single European Act, European integration in the fields of migration and asylum has been shaped with various legal and policy instruments (Spijkerboer, 2017, p. 1). The 1985 and 1990 Schengen Agreements, the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty, the 2007 Lisbon Treaty ensued such developments (ibid.) with a view to further harmonizing the rules regarding migration and asylum among EU Member States, and founding the legal basis of the cooperation with third countries in these fields.

Several policy developments in the EU took place at an intergovernmental level. Scholars describe the 1999 Tampere Council Conclusions as the *terminus a quo* of the externalization of migration and asylum policies in the EU (Boswell, 2003; Triandafyllidou & Dimitriadi, 2013), although the issue has been embraced previously in various formal documents and meetings of the Council and the Commission, including the Edinburgh European Council in 1992 (Boswell, 2003, p. 621). However, the establishment of a harmonized “common European asylum system” was decided by Member States only at the meeting of the Tampere European Council in 1999 (Vaughan-Williams, 2015, p. 18). Following the Tampere Conclusions, the external dimension of migration control has also been the EU’s focal point as the importance of the efficient management of migration flows and the conclusion of readmission agreements with third countries was *inter alia* highlighted (den Heijer, 2011, p. 177; Lavenex, 2006, p. 337). This has been a milestone in the EU history with regard to asylum and migration policies, as massive steps – which, at all times, involve cooperation with third countries – have been taken by Member States and EU institutions with the impetus given by the Tampere Conclusions.

The approach adopted in Tampere in 1999 has been incorporated into ensuing policy and legal documents. The cooperation with third countries on the management of migration flows and conclusion of readmission agreements in the event of illegal migration, as well as the actions to be taken vis-à-vis illegal migration and migrant smuggling have been reiterated in the 2002 Seville Council, the 2003 Thessaloniki Council, and the 2004 Hague Program (Boswell, 2003, p. 637; den Heijer, 2011, p. 177; Triandafyllidou & Dimitriadi, 2013, p. 601). The emphasis given to the significance of the security and control of external borders in the EU policy documents eventually resulted in the establishment of Frontex in 2005 (den Heijer, 2011, p. 178). In the meantime, as Spijkerboer (2017) discusses, the changes in EU law and policy on asylum and migration in the last two decades resulted in a shift from migration control (reactive, focus on individuals) to migration management (proactive, focus on populations). Hence, the arrival of migrants *en masse* fleeing from war, persecution and poor living conditions especially in Africa and the Middle East has resulted in the shift of a policy response at EU and Member State levels.

The externalization of migration management in the EU has been reinforced further after 2005. The approach involving cooperation with third countries has been salient in the ensuing EU policy documents including the 2005 GAM, the 2009 Stockholm Program, and the 2011 GAMM. What these three documents have in common is that they all emphasize the significance of strengthening external border controls and of migration management beyond the EU, cooperation and conclusion of readmission agreements with third countries (including Turkey, which is pronounced as “a priority” in the Stockholm Program), and the reduction of (irregular) migration (Casas-Cortes et al., 2016, p. 233; den Heijer, 2011, p. 179; European Commission, 2011; European Council, 2010). Although they mark the significance of the observation of human rights situation in the management of EU’s external borders (Vaughan-Williams, 2015); as in the most preceding and ensuing EU policy documents, the externalization of migration management stands out as a policy priority also in these three policy documents.

4.2.4.CEAS and Externalization: Complementing Internal Migration Management with an External Dimension

Since the 1999 Tampere Council, several legislative measures have been adopted in the EU for the establishment of a common European asylum system to realize the ideal of forming a harmonized asylum policy among Member States, establishing common procedures for asylum applications, and strengthening *the external dimension of asylum* (European Commission, 2019a, emphasis added). Currently, Article 78 of TFEU (formerly Article 63 of the EC Treaty) provides for the legal basis of the CEAS. On the other side, TFEU sets out the explicit legal basis also for the externalization of migration management (den Heijer, 2010). Articles 77(1)(c), 77(2)(d), 78(2)(g) and 79(1) of TFEU respectively give the European Parliament and the Council the mandates to adopt measures as to the management of external borders, cooperation with third countries for the management of inflows of asylum seekers, development of a policy for “the efficient management of migration flows,” and prevention of illegal immigration.

With this basis, several instruments were adopted within the framework of the CEAS, which now involve the revised versions of the Dublin Regulation²⁵, the APD²⁶, Reception Conditions Directive, Qualification Directive and EUODAC Regulation. In this regard, Dublin III Regulation contains the rules establishing the Member State responsible in the assessment and processing of asylum claims, as well as

²⁵ Dublin III Regulation (Regulation 604/2013/EU) is considered the cornerstone of the CEAS (European Parliament and Council, 2013b). The preceding regulations were the 1990 Dublin Convention, and the 2003 Dublin II Regulation. Upon the challenges posed especially by the migration crisis in 2015, the Commission proposed to amend Dublin III Regulation in 2016 (European Commission, 2016b).

²⁶ The 2013 Asylum Procedures Directive (Directive 2013/32/EU), which succeeded the 2005 Asylum Procedures Directive, sets out the minimum standards on procedures for the assessment of asylum claims in the Member States. It sets out the rules on granting and withdrawing refugee status, as well as framing the criteria to determine a third country as safe (Articles 33(2)(c) and 38) (European Parliament and Council, 2013a).

pronounces the concepts of “first country of asylum” and “safe third country” (Article 3(3)) – the countries to which asylum seekers may be returned on several grounds). Especially the Dublin Regulation has been severely criticized due to its deficiencies to provide an adequate and fair response to the large-scale forced movements of people, and to fairly distribute the responsibility for asylum seekers and refugees (ECtHR, 2016; Garcés-Mascareñas, 2015).²⁷ Likewise, the concept of safe third country set out in the APD has been expostulated as it results in the disregard and violation of the rights of asylum seekers (see *Section 4.2.5.a*).

Scholars including den Heijer (2010, 2011) and Lavenex (2006) argue that the application of the CEAS instruments, especially with regard to the asylum applications, is bounded to the EU territory. Indeed, although the locus of migration management in the EU has moved outwards through externalization, “the conduct of asylum procedures and the grant of asylum remain tied to the territory of the member states” (Lavenex, 2006, p. 342). Hence, the safeguards enshrined under the CEAS do not extend to third countries outside the EU. In this respect, questions regarding the extraterritorial application of the principle of *non-refoulement* (den Heijer, 2010, 2011; Gammeltoft-Hansen, 2011a, 2011b), and whether to grant asylum for those intercepted outside the EU territory (Gammeltoft-Hansen, 2011a), or whether to endow asylum seekers a “right to enter” the EU territory (den Heijer, 2011; Hirsch & Bell, 2017) have been debated for years.

Despite the territoriality of refugee protection in the EU, however, the CEAS comprises of a great number of references to the externalization of migration management. From the very outset, the EU’s rationale has been the prevention (or at least reduction) of migrants to the EU territory through the diversion of burden to third countries (see *Section 4.2.2*). In this regard, the CEAS establishes the basis for outsourcing migration management to the countries outside the EU. Therefore, through externalization, the EU first transfers the responsibility to assess asylum claims to the countries of first entry within the EU pursuant to the Dublin Regulation. Second, Member States may designate safe third countries, and the Union or Member States conclude readmissions agreements with third countries to which migrants may be returned (Triandafyllidou & Dimitriadi, 2013, p. 616) upon the rejection of asylum claims after an inadmissibility decision (Articles 33(2)(c) and 38, APD). As a result, the EU and Member States avail themselves of the area of maneuver underlying international law to evade the protection responsibilities through the disallowance of asylum seekers to the EU territory and within the framework of the CEAS.

4.2.5. Access Denied: The Instruments of Externalization

Since the early 1990s, a great number of policy documents and the EU *acquis* on asylum have manifested a plethora of measures that are implemented by the EU and Member States at different levels.

²⁷ Upon the 2015 migration crisis, several Member States (e.g. the United Kingdom, the Netherlands, Sweden, Italy and Germany) suspended the application of the Dublin Regulation by ceasing the so-called “Dublin transfers” to Hungary, Greece and Bulgaria (ECRE, 2018a).

Together with the developments in the EU asylum policy, the instruments of externalization have been enhanced. Interception of migrant vessels on the high seas, “push-back”²⁸ measures, the principle of safe third country, and the conclusion of border control arrangements or readmission agreements with non-EU countries are currently considered *qua* principal instruments of migration management at the external borders of the EU and beyond the EU territory (den Heijer, 2010, p. 173; den Heijer, 2011, p. 176).

As a result of the externalization of management of migration, policing of migration is positioned at the EU’s external borders, on the high seas or within a country, and the decision-making and enforcement are carried out prior to migrants’ access to the EU territory (Casas-Cortes et al., 2016; Ryan, 2010). Therefore, the EU is deciding “in” and acting “out.” With respect to the instruments enabling the EU to decide “in” and act “out,” this study focuses on the three different instruments of externalization below: *the concept of safe third country, readmission agreements, and interception at maritime and land borders.*

a. The Concept of “Safe Third Country”

The concept of safe third country involves a direct action of a state in the determination of a third country to which an asylum seeker can be returned on certain grounds, but serves as a precondition of another instrument of externalization, i.e. implementation of a readmission agreement between such a third country. In this regard, Lavenex (2006, p. 334) defines the concept as “[a] second form of early externalization” which is aimed at “the mobilization of third countries in the control of migration flows to Europe.”

The development of the concept of safe third country in international law dates back to the late 1970s, which then was incorporated into the EU *acquis* in the early 1990s. In 1979, the UNHCR Executive Committee concluded that in determining the responsible country for asylum claims, “the intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account” and “asylum should not be refused solely on the ground that it could be sought from another State” (UNHCR, 2009, p. 18). However, the existence of a country to which a person seeking asylum has closer links may be a ground for requesting such claim first from that state (ibid.). This conclusion by the UNHCR has portended the evolution of the concept of safe third country for the first time in international refugee law. In this regard, the last ground suggested by the UNHCR in 1979 has been expanded by the EU, and constituted a basis for the principle of safe third country (Frelick et al., 2016).

In the EU context, the concept of safe third country appeared already in the 1990 Schengen Implementation Agreement and the 1990 Dublin Convention (Lavenex, 2006). Currently, the concept of safe third country in the EU *acquis* is governed by Dublin III Regulation and the APD. According to Article

²⁸ “Push-back” is an informal, forcible removal of foreign nationals attempting to reach the territory of a state from a bordering state (CoE, 2018b, p. 6). It may be employed at the maritime or land borders by the state officials, including the police, border guards or coast guards or otherwise paramilitary (ibid.).

3(3) of Dublin III Regulation, “[a]ny Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU.” In this regard, Dublin III authorizes the Member States to return an applicant to a third country determined as safe based on Articles 33(2)(c) and 38 of the APD. Article 33(2)(c) of the APD prescribes that Member States may declare an asylum application “inadmissible” on the ground that an asylum seeker who lodged the application is found to have come from a non-EU Member State declared by that Member State as a safe third country for that specific claimant, pursuant to Article 38. Article 38(1) of the APD sets five criteria that must be taken into account by Member States when applying the safe third country concept. Accordingly, a third country is considered as safe for a particular applicant only if all of the following criteria are fulfilled by such country:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined in the Qualifications Directive;
- (c) the prohibition of *refoulement* in accordance with the Refugee Convention is respected;
- (d) the prohibition of removal of the applicant to a country where he or she would face torture and cruel, inhuman or degrading treatment is respected; and
- (e) the possibility exists to claim refugee status, and if the applicant is found to be a refugee, to receive protection in line with the Refugee Convention.

In addition to the criteria under Article 38(1), the APD sets out further safeguards. The existence of a reasonable connection between the applicant and third country is required (Article 38(2)(a), APD), and the concept of safe third country shall be considered on a case-by-case basis for a particular applicant (Article 38(2)(b), APD). Furthermore, an applicant shall be provided an effective remedy to challenge a decision considering a third country safe on the ground that the country is not safe in his or her specific circumstance (Article 38(2)(c), APD). When Dublin III and the APD are taken together, an applicant whose application is found to be inadmissible may be sent back to a third country which is deemed safe for him or her by the Member State in which the applicant claimed asylum. As a result, the determination of a third country as safe allows Member States to reject the assessment of an asylum claim and to return the asylum seeker to a third country where he or she would have lodged the application (Lavenex, 2006, p. 334).

It is noteworthy to consider that the APD provides for a step-by-step procedure. Throughout such procedure, what is ought to be is the application by Member States the criteria set out in Article 38(1) of the APD cumulatively, by also taking into account the link between the applicant and the third country, and his or her individual circumstance, as well as ensuring adequate opportunity and time for the applicant to contend an inadmissibility decision based on the existence of a safe third country. However, whether all of these criteria are taken into account in each single case, whether a country deemed as safe for an applicant is in fact safe (e.g. Turkey, see *Section 5.1.1*), or how Member States should apply these criteria in times of crisis (e.g. when migrants arrived at Greece *en masse*, as in the 2015 migration crisis) are a matter of debate. As the UNHCR stated recurrently in the Executive Committee meetings, “notions such as ... ‘safe third

country’, should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*” (UNHCR, 2009, p. 133). Therefore, rendering asylum claims inadmissible on the ground that the asylum seeker comes from a safe third country, regardless of a sufficient examination as to whether such country complies with these criteria, is one of the most salient illustrations of the threat that externalization poses to the rights of migrants and asylum seekers (Frelick et al., 2016, p. 196). In this respect, a disregard by a Member State of any of the criteria prescribed in Article 38(1) of the APD would lead to the denial of an applicants’ access to asylum, and protection from *refoulement*, as well as access to other rights under international, European and national law.

b. Readmission Agreements

Readmission agreements aim to ease the return of immigrants who lack the legal grounds for staying in a state territory, and to formalize such return process to the country of origin or transit (IOM, 2010, p. 14). In the case of a country of origin, such country readmits its own nationals who have entered or stayed illegally in the receiving country, whereas a country of transit in most cases readmits third country nationals (Lavenex, 2006, p. 341). In either case, however, both the receiving country and the country of return are obliged to ensure the safe return of illegal migrants under readmission agreements (IOM, 2010, p. 15).

The first readmission agreement in the EU was concluded in 1991 between the Schengen states and Poland, with the accession prospect of the latter (Lavenex, 2006, p. 340). Apart from the bilateral readmission agreements between Member States and third countries (e.g. Greece-Turkey) (Heck & Hess, 2017), since the 1997 Amsterdam Treaty, the EU has also concluded readmission agreements with a great number of third countries, pursuant to Article 63(3) of TEC (currently, Article 79(3) of TFEU) (Brouwer, 2010).

Despite the objectives, procedures and safeguards stipulated under readmission agreements as to “safe returns,” many scholars argue that readmission in fact facilitates the expulsion of asylum seekers and illegal immigrants to third countries. In the case of the removal of rejected asylum seekers, readmission agreements are problematic in two ways, which are also embed in the rationale behind the EU attempts to externalize migration management (see *Section 4.2.2*). First, they divert the burden of management and protection to third countries; second, they disregard the rights of asylum seekers by preventing their entry to the EU territory and their access to asylum in a Member State. For that reason, the UNHCR alerted state parties to the Refugee Convention with respect to readmission agreements already in 1998:

“[A]s regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum” (UNHCR, 2009, p. 129).

While Dublin III Regulation determining the Member States responsible in the assessment of asylum claims outsources the responsibility to Member States at the EU's external borders; in the case of rejected asylum seekers, readmission agreements designate a third country outside the Union responsible for the examination of such claims and granting a refugee status. In this respect, with a view to implementing the readmission agreements, some third countries (e.g. Turkey) are designated as safe so that rejected asylum seekers can be returned (Boswell, 2003, p. 622; Lavenex, 2006, p. 334). While it is dubious as to whether the third countries designated as safe for an asylum seeker are indeed safe (see *Section 5.1.1*), some third countries are overburdened with the shifting of protection obligations and the accumulation of the number of persons seeking for protection (Gammeltoft-Hansen, 2011b, p. 236) (see *Section 5.2.3*).

Ultimately, readmission agreements are aimed at preventing the access of migrants to the EU territory. In fact, the focus of concluding readmission agreements has been not only the removal of migrants and rejected asylum seekers from the EU territory (Boswell, 2003, p. 622; Lavenex, 2006, p. 341), but also prevention of persons from leaving for such territory (Brouwer, 2010, p. 210). In doing so, the EU also aims to delimit the practical legal access to the asylum authorities of Member States by curbing the access of asylum seekers to the EU territory (Triandafyllidou & Dimitriadi, 2013). As a result, “migrants are captured on the territory of third states” as the third countries tighten their border controls with the impetus given by readmission agreements (Brouwer, 2010, p. 210). “Those who would otherwise have been able to avail themselves of asylum procedures, social support, and decent reception conditions are often relegated to countries of first arrival or transit that have comparatively less capacity to ensure protection of human rights in accordance with international standards” (Frelick et al., 2016, 190-191). Therefore, readmission agreements focus on the removal of migrants, especially of asylum seekers, from the EU territory from the very outset – which contravene their access to asylum, as well as protection from *refoulement*.

c. *Interception at Maritime and Land Borders*

The practice of intercepting (irregular) migrants, especially at the EU's external maritime borders, has been utilized since 1990s with a view to preventing their access to the EU territory and avoiding responsibility for asylum claims (Ryan, 2010, pp. 22, 33). Such measures involve the obstruction of migrants on the high seas or over rivers or on land, and often the practice of pushing them back to the territory or territorial waters of a neighboring country at the EU's external frontier (e.g. Libya, Turkey). In the EU context, interception has become increasingly extensive and common in recent years, and is coordinated by Frontex or Member States (Gammeltoft-Hansen, 2011b, p. 121; Hirsch & Bell, 2017).

Even earlier than Frontex operations since its establishment in 2005, EU Member States have been engaging in interceptions and push-backs on the high seas. Following an agreement reached between Italy and Libya in 2007, “the Italian coastal authorities began intercepting migrants in international waters off

Lampedusa” (Ryan, 2010, p. 32), and returning them back to Libya (Hirsch & Bell, 2017). In a similar fashion, Spain responded to arrival of migrants to the Canary Islands from Morocco and Moroccan-controlled Western Sahara (Ryan, 2010, p. 33). Frontex has also been assisting the two EU Member States with missions Hera in the Canary Islands and Hermes in Italy (Gammeltoft-Hansen, 2011b). Thus, rather than allowing migrants to arrive at the state territories, Italy and Spain engaged in the interdiction of vessels (Ryan, 2010, p. 33) individually or jointly with Frontex.

In the last two decades, Greece has also joined the club by intercepting migrants in the Aegean Sea and at the Evros River, solely or together with Frontex, to prevent their access to its territory. Already in 2006, the Greek coastguards intercepted a migrant boat carrying Iraqi and Palestinian asylum seekers who were attempting to cross to Greece in the Aegean Sea and “dumped” them in the Turkish territorial waters (Gammeltoft-Hansen, 2011b, p. 211). Especially after the outbreak of the Syrian civil war in 2011, Greek interceptions and informal push-back practices in the Aegean Sea and in the Evros region have augmented, leading to serious and systematic human rights violations (PRO ASYL, 2013). “Following a request from Greece for assistance in managing its territorial border with Turkey” (Durham University, 2011), Frontex began to operate at the Greek-Turkish land border in Evros and with joint operation Poseidon in the Aegean Sea in 2011 (Gammeltoft-Hansen, 2011b, p. 121; Triandafyllidou & Dimitriadi, 2013, p. 602). In this respect, the deployment of Frontex forces at the EU-Turkey border and the Greek push-backs, *inter alia*, would compensate the abolishment of internal borders of the EU by eliminating the entry of (irregular) migrants to the Union at the external borders.

Ultimately, the interdictions at maritime and land borders in the European context involve the EU’s two rationales (see *Section 4.2.2*). They are aimed both at the prevention of the entry of migrants to the EU, and the diversion of the burden of migration management and responsibility to third countries (e.g. Libya, Morocco, Turkey). However, this approach is problematic in two ways. First, it outsources the responsibility of control and protection initially to Member States at the external borders, and then to third countries. Since it is the Member States at the EU’s external frontiers who are responsible for border management (European Commission, 2015a), massive migration inflows overburden these “peripheral Member States” as it obliges them to secure the “inner Member States” (Triandafyllidou & Dimitriadi, 2013, p. 601). Concordantly, especially southern Member States (e.g. Spain, Italy, Greece) expand the migration management beyond their territories towards non-EU countries (den Heijer, 2010, p. 172). As a result, the emphasis in practice is given to securing and controlling the external borders of the EU, and safeguarding “European citizens” from “irregular flows” trespassing the EU rules on borders, visa and legal migration.

Lastly, this brings us to the fact that these measures contravene the right of asylum seekers to access to asylum and their protection from *refoulement*. Especially with regard to the principle of *non-refoulement*, albeit pronounced also in the Frontex Regulation, the principle is not taken into account in practice. Indeed,

Frontex and EU Member States engage in indiscriminate interdictions at the EU's external borders by diverting the migrants towards third countries and repudiating their status as potential asylum seekers or refugees (Moreno-Lax, 2017). Without giving them the opportunity to access to the EU territory, asylum seekers are destitute of presenting their individual cases which would enable them to access to obtain refugee status in an EU Member State. As a result, the EU prevents the access of migrants to the EU territory, to asylum, and to certain other rights.

4.3. The Externalization of Migration Management and the Turkish Asylum Regime

This Section presents how the Turkish migration and asylum regime has evolved under the influence of its relations with the EU. By doing so, it discusses how the Europeanization of Turkish migration and asylum regime led to the enactment of brand-new legal codes for the purpose of effectively responding to the “newcomers” in the country. In this respect, *Section 4.3.1* divides such developments into two eras, i.e. before 2013 and 2013-present, as 2013 has been a turning point in the Turkish asylum regime with the enactment of the LFIP. *Section 4.3.2* articulates what legal guarantees are provided to non-European asylum seekers and refugees in Turkey. *Section 4.3.3* sets out the uttermost phase of the EU-Turkey relations, as well as (from an EU perspective) of the externalized migration management, which ended up in the conclusion of the EU-Turkey Statement. It sheds light on the sequence of events caused its adoption, the commitments of both parties under the Statement, and whether the Statement has been successful to curb (irregular) migration at the Greek-Turkish border. In order to understand the impact of the EU-Turkey Statement on the rights of asylum seekers and refugees, it is significant to have an insight on the conditions asylum seekers that are returned or expelled from Greece under the Statement encounter in Turkey.

4.3.1. The Changing Context of Refugee Protection in Turkey

a. Before 2013

There has been an ever-increasing attention given in academia to the Turkish migration and asylum regime and to the effects of European externalization policies in Turkey since early 2000s. The interest in migration and migration politics in Turkey among academia, Turkish state and public has evolved especially after 1999 with the commencement of Turkey's accession negotiations with the EU, and due to the pressure imposed by Europe on Turkey to regulate migrant influxes (Heck & Hess, 2017, p. 38). The construction of closer relations with the EU led to a change in the context of asylum and migration regime in Turkey and the enactment of new laws and regulations.

Since the 1980s, Turkey has been both a transit country to the migrants coming especially from its neighbors in the Middle East and from Asia and Africa, and an immigration county. Turkey imposed an

open-door policy and a visa free regime towards Balkan countries, and some of the countries in the Commonwealth of Independent States and the Middle East (Heck & Hess, 2017, p. 40). Hence, Turkey received a great number of migrants throughout the years who mostly aim to transit through the country towards Europe for better living conditions, enriched economic aspects, and “quality protection.”²⁹

In such context, refugee protection in Turkey made no headway at all. Until 1994, the UNHCR had undertaken the sole responsibility in Turkey to assess the asylum claims and the resettlement of refugees into third countries, as Turkey retained the geographical restriction to the application of the Refugee Convention (Heck & Hess, 2017; Sarı & Dinçer, 2017). Due to this geographical limitation, while only applicants from Europe, i.e. nationals of a member state of the CoE, are considered “convention refugees” (Heck & Hess, 2017, p. 41), application to obtain a refugee status for non-Europeans is steered via the UNHCR (idem, p. 42). As a result of bifurcations, non-European asylum seekers in Turkey are left with more perplexity with regard to the procedure they must seek to obtain some type of a legal status to (albeit not permanently) reside in Turkey.

In this regard, 1999 has been a milestone in the history of Turkish migration and asylum regime. Following Turkey’s achievement of official candidacy in its accession to the EU at the 1999 Helsinki summit, Turkey’s migration and asylum laws and policies began to become Europeanized and more institutionalized (Heck & Hess, 2017; Sarı & Dinçer, 2017). Although Turkey began to reform its migration and asylum regime largely after the commencement of the accession negotiations with the EU, the regime retains its uncertainty and unpredictability, and the securitization of migration and asylum continues to prevail over the rights of refugees in the country (Sarı & Dinçer, 2017, p. 59). Therefore, the top-down changes introduced by the EU could not ameliorate the quality of protection in Turkey with regard to access to asylum, the possibility to obtain protection, and (if granted such protection) the level of protection.

b. 2013-present

Although there have been several changes in the Turkish migration and asylum regime after the Helsinki summit in 1999, substantial reforms with regard to the protection granted to non-Europeans have come to the agenda following the outbreak of the Syrian civil war in 2011. In this regard, only after 2011 Turkey began to take the conditions of refugees into consideration more comprehensively (Ataç et al., 2017, p. 11), but it took some years for Turkish law- and policy-makers to put those considerations into practice.

²⁹ The notion of “quality of protection” is used by Gammeltoft-Hansen (2011b) to explain the scope and level of rights afforded from a state to refugees. Prevention of asylum seekers’ access to state territory, which certainly prevents their access to asylum and to other rights, and diverting the responsibility to grant these rights onto third countries (e.g. safe third countries) bring the questions as to whether these countries will grant protection, or asylum seekers will be bestowed a quality protection (Gammeltoft-Hansen, 2011b, p. 30). The shift of responsibility to less developed states, or to states with poor human rights records and inadequate refugee protection regime affects the rights that may be granted to asylum seekers, thus, changes the quality of protection (ibid.). See also *CHAPTER V*.

In this respect, major reforms began to take place after 2013. In 2013, the DGMM was established under the LFIP which came into force in April 2014 (Sarı & Dinçer, 2017, p. 60). In the field of the management of migration and asylum, the DGMM engages in the matters related to registration, protection, detention and deportation of documented and undocumented immigrants in Turkey (Heck & Hess, 2017, p. 42). Any asylum claim lodged by an asylum seeker, regardless of his or her country of origin (saving Syrians), within Turkey is now governed by the LFIP (DGMM, 2013). With the enactment of this brand-new law, assessment of asylum claims became more institutionalized and civilized.

In contrast, many scholars argue that the LFIP retained several issues embed in the Turkish asylum regime. First, the new law problematically brought the approaches to protect human rights and safety of migrants with the references to criminalization and migration control (Ataç et al., 2017, p. 12). Although the principle of *non-refoulement* is pronounced in the Law (Article 4, LFIP), it is directly excerpted from the definition in the Refugee Convention, and does not provide any further guarantees. Rather, the LFIP contains strict provisions on detention and removal of foreigners who illegally enter or stay in Turkey to their country of origin, a transit country or a third country (Article 52 *et seq.*, LFIP), as well as their deportation in the event that they “pose a threat to public order or public security or public health” (Article 54(2), LFIP). This approach not only disregards the fact that they may be asylum seekers who do not have identity documents, but also the principle of non-penalization of refugees and asylum seekers for unauthorized entry or stay enshrined in Article 31 of the Refugee Convention (see *Section 3.4* above) as well as in Article 65 of the LFIP and Article 5 of the TPR (see *Section 4.3.2* below).

Second, despite the demands raised by the EU against the geographical limitation, it is codified also in the LFIP (Heck & Hess, 2017, p. 42). Due to the current dual asylum system in Turkey, the country grants non-European asylum applicants the status of “conditional refugee,” and the right to temporarily reside in Turkey (Sarı & Dinçer, 2017, p. 59-60), whereas it is the UNHCR that entitles them a refugee status and a right to seek resettlement in a third country willing to receive them (Sarı & Dinçer, 2017, p. 60) (see *Table 1* below). Furthermore, non-Syrians in Turkey are unable to select the city they want to reside, as they may be assigned to a specific “satellite city” by the Turkish authorities (Article 71(1), LFIP), and their movement outside such city is restricted (Article 77(1)(ç), LFIP). In contrast, persons fleeing from European countries due to well-founded fear of persecution are considered as “refugees” (Article 61, LFIP) and they are granted the rights enshrined in the Refugee Convention and the permanent right to stay in Turkey. This bifurcation based on the asylum seekers’ country of origin leads to the bifurcation in the scope of rights that they are entitled to: hence, it brings the question as to whether conditional refugees have in fact a right to (seek and enjoy) asylum in Turkey.

In addition, since the LFIP was not designed to respond to the situations of migration *en masse*, a new regulation of temporary protection was enacted for Syrians in 2014 (Ataç et al., 2017, p. 12-13).

Although in the first years of the Syrian civil war, Turkey introduced an open-door policy towards all refugees coming from Syria (Heck & Hess, 2017, p. 42), excessiveness of the persons fleeing Syria coupled with the closed-door policy of the EU resulted in the (unforeseeable) accumulation of the Syrian refugee population in Turkey. However, temporary protection procedures governing Syrian refugees have further complicated the system (Sarı & Dinçer, 2017, p. 60). In this respect, Syrians are granted temporary protection status and excluded from the implementation of the LFIP (Heck & Hess, 2017, p. 42) (see *Table 1*). This category of protection refers to the 2001 European Council Directive on Temporary Protection for *mass migration circumstances*, although “its temporal scope and prospects for naturalization [in Turkish law] have not been properly defined” (idem, p. 43, emphasis added). On the other side, the TPR has provisions which preclude the right of Syrian asylum seekers to seek and enjoy asylum, and render their status in Turkey ambiguous. For instance, their temporary protection status may be terminated any time by a Council of Ministers decision (Article 11, TPR), their application for international protection are not processed (Article 16, Provisional Article 1, TPR), and their status grants them a right to stay in Turkey, which is not deemed to be equivalent to a residence permit or documents (Article 25, TPR). This can be explained by the “temporariness” of such status, as the aim is to allow Syrians to reside in Turkey “only while the war lasts in Syria, and subsequently return [them] there when conditions improve” (EESC, 2018). As a result, under Turkey’s temporary protection regime, Syrians are not recognized as refugees according to international refugee law, but are given the legal right to reside within the country (Baban, Ilcan & Rygiel, 2017).

Place of origin Level of protection	Europeans	Non-Europeans	
		Syrians	Non-Syrians
1. Eligibility for protection under the Law No. 6458 on Foreigners and International Protection	Yes. They are considered as “refugee” by Turkish government under the Refugee Convention.	No. See point 2 below.	Yes. They are granted “conditional refugee” or “subsidiary protection” status. They are allowed to reside in Turkey until they are resettled to a third country.
2. Eligibility for temporary protection in Turkey	No. See point 1 above.	Yes. They are granted “temporary protection” status.	No. See point 1 above.
3. Eligibility for “refugee” status by the UNHCR in Turkey for resettlement in a third country	Yes.	No. Their application shall not be processed.	Yes.

Table 1. Current legal regime in Turkey with regard to the level of international protection granted to asylum seekers, based on their countries of origin (based on the LFIP, and articles by Sarı & Dinçer (2017) and Heck & Hess (2017)).

4.3.2. The Rights of Non-Europeans under Turkish Law

Apart from the bifurcations based on the asylum seekers' places of origin and the levels of protection provided to European and non-European asylum seekers in Turkey, certain guarantees are afforded for asylum seekers and refugees in the country. In this connection, Turkey has ratified the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol (in 1962; in 1968), the ICCPR (in 2003) and the ECHR (in 1954). Human rights in Turkey are protected, *inter alia*, by virtue of these human rights conventions, as they carry the force of domestic laws (Article 90, Turkish Constitution). From the very outset, therefore, Turkey has accepted to fully guarantee the rights enshrined in these conventions to all individuals within its territory or jurisdiction, regardless of their race, religion, nationality, membership of a particular social group or political opinion or otherwise, including refugees and asylum seekers.

As Turkey retained a geographical restriction to the Refugee Convention and it does not grant non-Europeans a legally recognized refugee status thereunder, the secondary rights enshrined in the Convention can be granted by the Turkish authorities only to European refugees (see *Section 3.4* and *Section 4.3.1*). This being the case, certain guarantees for non-Europeans are laid down in national legal instruments. In this regard, the rights that may be granted to Syrians under the temporary protection regime are set out under the TPR, whereas to non-Syrians who have a conditional refugee status are codified in the LFIP. Under the TPR, Syrians who are under temporary protection status are entitled to the principle of non-penalization in the event of illegal entry into or stay in Turkey (Article 5, TPR), protection from *refoulement* (Article 6, TPR), and services including health, education, access to labor market, and social assistance (Article 26 *et seq.*, TPR). Furthermore, Article 19 of the TPR prescribes that “[they] shall be informed on the process related to temporary protection, their rights and obligations and other issues in a language they can understand.” However, their access to certain rights (except education and emergency health services) may be restricted if they do not abide by their obligations (e.g. if they move outside a temporary accommodation center designated by the Turkish authorities) (Article 35, TPR).

Non-Syrians who are granted conditional refugee status are entitled to the protection from *refoulement* (Article 4, LFIP), the right to access to courts against detention decisions (e.g. Articles 57(6) and 68(7), LFIP), the principle of non-penalization on the account of illegal entry or stay (Article 65, LFIP), the rights to access to education (Article 89(1), LFIP), and access to primary health care (Article 89(2), LFIP). On the other side, while European refugees in Turkey are afforded a more extensive right to access to labor market, and may work “upon being granted the status,” a conditional refugee may apply for a work permit only after six months following the filing of his or her international protection claim (Article 89(4), LFIP). In addition, Turkish law sets out further guarantees also for foreigners under detention, including the right to access to lawyer and to information about his or her detention (Article 68(4), LFIP), and access to visitors, including lawyer and UNHCR officials (Article 68(8), LFIP).

4.3.3. On the EU-Turkey Statement of 18 March 2016

a. *A Summer of Migration*

The summer of 2015 has been challenging both for the EU and Turkey with regard to the immense number of Syrian refugees fleeing their countries. As the media and academia described, it has been one of the largest forced movements ever since the end of World War II. While the vast majority of migrants (885,386 of 1.82 million) transited through Turkey over the Eastern Mediterranean route into Greece (Frontex, 2016), the unprecedented increase in the number of refugees at the EU's external borders led to a humanitarian crisis. During this period, 56 per cent of the migrants crossing into the Greek islands from Turkey were Syrians, which was followed by Afghans with 24 per cent and Iraqis with 10 per cent (ibid.). At this juncture, with a view to preventing or to entirely curbing the migrants coming from this route, the EU commenced talks for cooperating with Turkey. This resulted in the adoption of the EU-Turkey Statement of 18 March 2016 – which was aimed at the management of migration at the EU's external border between Greece and Turkey or within Turkey even before migrants reach the EU territory.

Preparations for the Statement began already after the summer of migration in 2015 with the adoption by the EU of measures for externalization. The first meeting between the EU ministers for home affairs and for foreign affairs and their counterparts from Turkey actualized on 8 October 2015, where the leaders discussed strengthening the management of the EU's external borders in the future by reinforcing the role of Frontex (European Council, 2015a). On 15 October 2015, the European Council discussed the adoption of an EU-Turkey joint action plan under the EU's scheme for cooperating with countries of origin and transit with a view to preventing potential “irregular flows” and to fighting against migrant smuggling (European Council, 2015b). In this regard, the possibility of a visa liberalization for Turkish citizens, reenergization of Turkey's accession process, implementation of the readmission agreement (ibid.) – which later had been incorporated into the EU-Turkey Statement – were already on the agenda.

According to the JAP, both parties agreed to support the Syrians under temporary protection regime in Turkey, and to strengthen the cooperation to prevent (irregular) migration to the EU (European Commission, 2015b). In this regard, the EU expressed its intentions to allocate further funds to support Turkey in coping with the challenge posed by the presence of Syrians under temporary protection, reinforcing the Turkish coastguards, engaging in joint return operations of migrants to their countries of origin (ibid.), deploying ILOs to Turkey, and developing a better asylum, migration, visa and integrated border management system in line with the EU *acquis* (European Commission, 2015b). On the other side, Turkey agreed to continue enhanced and effective implementation of the LFIP, to further strengthen the interception capacity of the Turkish coastguards, to cooperate with Bulgarian and Greek authorities to prevent migrants reaching into the EU, to readmit migrants intercepted at the EU-Turkey external border, to ensure the asylum procedures, and to further intensify its cooperation with Frontex (ibid.). It is highly crucial to underline

that the JAP comprises almost all of the measures of externalized migration management in the EU context (e.g. readmission, border management, interception at external borders) which are aimed at preventing the passage of migrants to the EU or their expulsion from the EU through cooperating with third countries.

The initial talks between the EU and Turkey have continued with an intensified bargaining process. The meeting of the EU heads of state or government on 12 November 2015 paid a particular attention to the cooperation with Turkey and the implementation of the measures discussed in October (European Council, 2015c). The EU leaders agreed, *inter alia*, upon setting up hotspots³⁰ in Greece and Italy, reinforcing Frontex and further strengthening the control of the EU's external borders (ibid.). In the meantime, while the maritime arrivals in the Mediterranean Sea in October 2015 was 222,800; it dropped to 156,025 in November 2015 and 119,504 in December 2015 (UNHCR, s.a.) – there is no doubt that it resulted from the conclusions adopted by the EU leaders during the fall of 2015 for the reinforcement of the EU's external borders. During the meeting between the parties on 29 November 2015, the EU and Turkey decided to activate the JAP, and the EU agreed to provide an initial €3 billion of sources to support Turkey in improving the conditions of Syrian refugees (European Council, 2015d). The parties *inter alia* agreed on the activation and full implementation of the EU-Turkey Readmission Agreement from June 2016 onwards, and reiterated the lifting of visa requirements for Turkish citizens in the Schengen area by October 2016 (ibid.).

b. Migrants as a Bargaining Tool: A Win-Win-Lose Situation

The commitments given by the EU and Turkey on the migration crisis were followed by the meetings between the EU heads of state or government and Turkey in the first quarter of 2016. In the meeting held by the EU leaders with Turkey on 7 March 2016, parties agreed to strengthen their cooperation on the crisis with a view to wholly and rapidly implementing the JAP and to reducing the number of migrants crossing from Turkey to Greece (European Council, 2019). Furthermore, “Turkey ... agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all migrants intercepted in Turkish waters” (European Council, 2016b). On 18 March 2016, the head spinning sequence of meetings since the fall of 2015 has come to fruition as the EU and Turkish leaders entered into a “deal” which is officially known as the EU-Turkey Statement (European Council, 2019). The outcome of the meetings was divulged with a press release. Accordingly, parties reapproved the implementation of the JAP activated on 29 November 2015 by confirming Turkey's progress in opening its labor market to Syrians under the TPR, and introducing visa requirements for Syrian nationals (European Council, 2016b). In order to achieve the goal to “end the irregular migration from Turkey to the EU,” the parties agreed, *inter alia*, on the following points:

³⁰ The reception camps hosting the asylum seekers arriving at the Greek islands and Italy are often referred to as “hotspots” (CoE, 2018a).

- All migrants crossing from Turkey into the Greek islands will be returned to Turkey as of 20 March 2016.³¹ This will occur in compliance with the principle of *non-refoulement* and the pertinent international standards, thus excluding any kind of collective expulsion. Migrants who do not apply for asylum or whose applications lodged to the Greek authorities are declared unfounded or inadmissible pursuant to the APD will be returned to Turkey.³²
- For each Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey (also known as “one-for-one principle”, as stated in Spijkerboer, 2017).
- Turkey will endeavor to prevent irregular migration on maritime and land frontiers between the EU and Turkey.
- The visa liberalization roadmap for lifting the visa requirements of Turkish citizens will be expedited, and Turkey will endeavor to fulfil the remaining requirements.
- For the purpose of supporting Syrian refugees’ basic needs, including healthcare, education, infrastructure, food and other living costs, the EU will allocate an additional €3 billion by the end of 2018.³³
- The EU and Turkey agreed to upgrade the Customs Union, and to accelerate the accession negotiations. (European Council, 2016b)

In view of the commitments reinforced by the parties, it has become salient that the deal has two winners and a loser. On the one side, although unblinkingly accepted to become a buffer zone to host sheer number of Syrians, Turkey achieved the chance to make progress in the Customs Union and in its accession to the EU, as well as (although not realized) to lift visa requirements for its citizens. While the deal granted Turkey a pivotal role in the migrants crisis, it in fact has become one of the third countries in the EU’s scheme to strengthen the external borders of the EU and to prevent migrant influxes into the Union. Whereas the EU obtained the opportunity to further outsource the management of migration at its external borders by curbing migratory inflows attempting to access the EU territory, as well as to evade administrative, financial and social costs that would emanate from the removal (den Heijer, 2011; Lavenex, 2006; Ryan, 2010) or the inclusion and naturalization of migrants in a Member State, and to lift the debates over the migrants threatening the European identity (Boswell, 2003; Frelick et al., 2016; Triandafyllidou & Dimi-triadi, 2013). The other side of the coin involves the poignant conditions at the hotspots in Greece, where asylum seekers are trapped in a limbo while waiting for the assessment of their asylum claims (Karakoulaki, 2018); as well as Syrian refugees in Turkey who are trapped in another limbo due to Turkey’s geographical

³¹ The legal basis of the return of all migrants (who do not apply for asylum or whose asylum applications are declared inadmissible) from Greece to Turkey is the bilateral Greek-Turkish Readmission Agreement (until 1 June 2016), and the EU-Turkey Readmission Agreement (from 1 June 2016) (European Commission, 2016d).

³² Among these migrants, there may be asylum applicants lodging their claims to the Greek asylum authorities. Applications of these migrants may be declared inadmissible, i.e. may be rejected without further examination on the merits, on two different legal grounds. A person who is found to have already been recognized as a refugee in Turkey or otherwise enjoys adequate protection there is returned to Turkey on the basis of Article 35 (“first country of asylum”) of the APD (European Commission, 2016d). Whereas a person who has not received protection in Turkey is returned there on the basis that Turkey is safe for him or her under Article 38 of the APD (ibid.). In applying the concept of first country of asylum, Member States may take Article 38(1) into account (Article 35, APD).

³³ As stated by European Commission (2016d), the budget financed by the EU and national contributions of the Member States is used to for the refugees in Turkey.

restriction implemented to non-Europeans. Therefore, while the EU and Turkey are winning, refugees are all losing: a win-win-lose situation.

c. Success or Failure?

In the meantime, it has been debated whether the EU-Turkey Statement has been “successful” to curb the migrant crossings from Turkey to Greece. In this regard, scholars are divided as to the decrease in the number of refugees transiting through Turkey into the Greek islands. While Heck and Hess (2017, p. 35-36) argue that the implementation of the EU-Turkey Statement resulted in the drop in the number of movements in April 2016, Spijkerboer (2017, p. 14) asserts that the number of migrants crossing over the Eastern Mediterranean route decreased already before the EU-Turkey Statement. However, the EU-Turkey Statement must not be held as a single document, but a bundle of commitments, measures and practices of the parties which has been commenced already in the fall of 2015 with the activation of the JAP, as well as the preparatory measures taken solely by the EU regarding the reinforcement of its external borders. Furthermore, statistics do not lie: maritime arrivals at the Greek islands decreased from 210,824 in October 2015 (UNHCR, 2016a) to 26,971 in March 2016 (UNHCR, s.a.), which coincides with the period following the adoption of the JAP until the conclusion of the EU-Turkey Statement; and to 3,650 in April 2016 (ibid.), right after the full implementation of the Statement. In addition, the total number of sea arrivals via the Eastern Mediterranean route dropped from 885,386 in 2015 to 173,450 in 2016 (Frontex, 2016) and to 29,718 in 2017, but increased to 32,494 in 2018 (UNHCR, 2019c). Whereas as of December 2018, only 18,094 Syrian refugees have been resettled from Turkey to the EU Member States, including Germany, France and the Netherlands having the largest number (European Commission, 2018a). Ultimately, it is a crystal-clear fact that the EU-Turkey Statement has made the greatest contribution in restraining the movement of migrants from Turkey to Greece.

Apart from the “success” of the Statement in reducing the number of crossings in the Aegean Sea, the “dirty” deal between the parties raised a big outrage among public, human rights organizations, politicians, media and academia (*Sputniknews*, 2016). Several NGOs and scholars criticized the EU-Turkey Statement on the grounds that Turkey does not comply with the requirements of being a safe third country under European or international law, and that this international agreement was reached without the compliance with the EU constitutional law requirements under TFEU (Spijkerboer, 2017, p. 6). Already in 20 March 2016, the EU-Turkey Statement was brought before the General Court³⁴ by a number of asylum seekers for its annulment (General Court, 2017). In its judgment of 28 February 2017, the Court decided that it lacks jurisdiction to rule on the Statement (ibid.) as the EU-Turkey Statement does not bind the EU

³⁴ General Court is the court of first instance in the CJEU which deals with cases directed against the EU institutions, e.g. certain actions for annulment (EU, 2018; Spijkerboer, 2017).

but the Member States, because “the Heads of State or Government did not meet in the capacity of members of the European Council, but as representatives of the Member States” (Spijkerboer, 2017, pp. 7-9). Hence, although the EU-Turkey Statement itself ambiguously regard the Statement as “the EU”-Turkey Statement, the document does not bind the Union itself, but the Member States.

As a result of the developments in the last decade, Turkey is currently overwhelmed with the excessive number of persons of concern who are in need of international protection. The changes in the Turkish asylum regime under the EU influence have been followed with the EU-Turkey Statement of 18 March 2016, the talks of which was commenced already with the EU-Turkey JAP in 15 October 2015, wherefrom the population of registered Syrian refugees in Turkey increased from 2.2 million to 3.6 million as of February 2019 (UNHCR, 2019d). Therefore, Turkey acts as a buffer zone to keep the asylum seekers out of the EU territory. As Baban, Ilcan and Rygiel (2017) rightly argue, “the deal nevertheless trades in lives by permitting some people and selected Syrian refugees to move but leaves most would-be refugees to live in Turkey, facing insecurities through both the temporary protection regime and humanitarian assistance.” In this context, the EU sees the refugees in Turkey “only ... as shadows or moving figures ‘at the other side of the fence’ (Grahl-Madsen, 1963). It is, therefore, unequivocal that millions of refugees, especially Syrians, are left somewhere behind the borders: in Turkey and with the lack of protection.

4.4. Interim Conclusion

From the outset, the EU policy on asylum have concentrated on the suppression of “irregular flows” and the diversion of burden of migration management and protection to countries of origin and transit. The two rationales have been salient in the EU policy and legal documents since the early 1990s. The 1999 Tampere Conclusions have been the turning point of both internal and external dimensions of the EU asylum policy, and the conclusions adopted therein reiterated these rationales both on paper and in practice.

It is noteworthy that within the EU, internal and external dimensions have always been intertwined. Currently while the legal and policy instruments of the CEAS, including Dublin III and the APD, constitute the backbone of the internal affairs as to asylum procedures; they also authorize the EU institutions and Member States to adopt policies and measures on the matters related to the externalization of migration management. In this respect, with a view to preventing migration and migrant smuggling, and cooperating with third countries as to the management of migration; the EU and Member States may conclude readmission agreements with third countries, and Member States may designate third countries as safe. Furthermore, Frontex and Member States engage in operations at the external borders of the EU, whereby their main role in practice consists of interceptions and push-backs to curb migrant influxes.

Turkey, in this connection, has been on the agenda of the EU for a long while. While the Turkish asylum regime is relatively a young one despite the deep-rooted migration history of the country, major

reforms have been made throughout Turkey's accession negotiations with the EU in the last two decades. Despite the developments in the regime, the condition of asylum seekers and refugees in Turkey preserve its ambiguity and uncertainty, as Turkey retains the geographical restriction to the Refugee Convention and does not provide effective protection to non-European asylum seekers. The peak point of these developments has been the conclusion of the EU-Turkey Statement on 18 March 2016. Accordingly, the parties agreed on tackling (irregular) migration at the Greek-Turkish border by returning all migrants (regardless of their status) to Turkey as of 20 March 2016, and operating the EU-Turkey readmission agreement as of June 2016. The EU, *inter alia*, committed to provide financial support up to €6 billion to Turkey to improve the conditions of Syrian refugees in the country. Whereas Turkey accepted to become a buffer zone to host more than 3.6 million refugees with the lack of adequate protection and rights. As a result, asylum seekers and refugees are excluded from the EU territory, from the application of general law (i.e. from obtaining a durable juridico-political status) and from accessing to some kind of organized community to claim and enjoy their rights (i.e. from the space of appearance) both in Greece and in Turkey (this is discussed more thoroughly in *Section 5.2* below).

CHAPTER V

The “Right to Have Rights” and the EU-Turkey Statement: The Two Unimaginable?

5.1. The EU-Turkey Statement from a Legal Perspective

As *CHAPTER IV* articulated, the practices externalizing the management of migration in the EU context date back to the early 1990s. The utmost specimen of such practices resulted in the so-called EU-Turkey Statement, as the number of crossings from Turkey to the EU reached over 885,000 in the summer of 2015. With a view to tackling the movement of migrants from Turkey to Greece and migrant smuggling activities in the region, both Greece and Turkey took a plethora of measures by virtue of the Statement. In this respect, the formal measures aimed at preventing the crossings involve the readmission by Turkey of asylum seekers and refugees who do not apply for asylum in Greece or whose asylum applications are declared inadmissible. Whereas the unpronounced informal measures comprise of the push-back practices exerted by the Greek authorities at the Greek-Turkish land and maritime borders.

In this respect, this *Section 5.1* constitutes the first part of the analysis and answers the following research question presented in *CHAPTER I*:

What is the impact of the EU-Turkey Statement of 18 March 2016, an instrument utilized by the EU to externalize the management of migration, on the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands and in Turkey?

The Section is divided into three subsections, each of which analyzes in the context of the EU-Turkey Statement the three different externalization instruments identified in *CHAPTER IV*. Section 5.1.1 (*Turkey as a Safe Third Country?*) examines whether Turkey can be considered as a safe third country or first country of asylum under the APD. Section 5.1.2 (*Readmission to Turkey*) scrutinizes the impact of the EU-Turkey Readmission Agreement (which succeeded the Greek-Turkish Readmission Agreement) on the access of asylum seekers and refugees to asylum and to other rights in Greece and Turkey. Section 5.1.3 (*Interceptions at the Greek-Turkish Border*) crystallizes how the informal interception of asylum seekers and refugees at the Greek-Turkish maritime and land borders influences their access to asylum and to other rights. Overall, all of these three subsections ponder upon whether and how the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands and in Turkey are affected by virtue of these three instruments of externalization. In particular, this *Section 5.1* analyzes how these instruments influence the access of asylum seekers and refugees to asylum or a legally recognized refugee status, to the secondary

rights under the Refugee Convention (see *Section 3.4*) or in Turkish law (see *Section 4.3.2*), and to certain other rights articulated in international and regional human rights instruments (see *CHAPTER III*).

5.1.1. Turkey as a Safe Third Country?

As presented in *Section 4.2.5.a*, the principle of safe third country has been one of the instruments utilized by the EU and Member States to prevent the access of asylum seekers to the EU territory and to shift the burden of migration management and protection to third countries. In the EU context, its legal basis is set out in the Dublin III Regulation and the APD. However, adoption of the EU-Turkey Statement even before Greece incorporated a legal framework designating a third country as safe raised debates “especially due to the presumption that Turkey is a safe third country” (Gkliati, 2017, p. 213).

Section 4.3.3 showed that the return of migrants under the EU-Turkey Statement is based on different legal frameworks. Towards all of these migrants there is one common assumption: the ones that are not in need of international protection can be returned to Turkey as from 20 March 2016 (European Council, 2016b). This means that either they do not apply for asylum, or their applications are found to be inadmissible by the Greek asylum authorities. In this regard, there are two possibilities for Greece to declare asylum applications inadmissible. First, a person who is found to have been recognized as a refugee in Turkey or otherwise afforded sufficient protection there will be returned to Turkey on the basis of Article 35 (“first country of asylum”) of the APD (European Commission, 2016d). Second, a person who has not received protection in Turkey will be returned there on the basis that Turkey is safe for him or her under Article 38 of the APD (*ibid.*). Article 35 of the APD manifests that Member States may take Article 38(1) into account when applying the concept of first country of asylum. In addition, since Article 38 of the APD offers more safeguards than Article 35, as the third country in question must fulfill stricter criteria; the assessment of Article 38 in regard to Turkey will *a fortiori* amount to the examination of Article 35 as such. The analysis, therefore, will only examine Article 38(1) of the APD in the context of Turkey.

Following the adoption of the Statement on 18 March 2016, both Greece and Turkey took action with a view to implementing the commitments of the EU and Turkey under the Statement, including the safe returns. As a Member State at the external border of the EU and receiving thousands of asylum seekers every year, Greece amended its legislation in line with the EU *acquis* by incorporating the concepts of first country of asylum and safe third country (European Commission, 2016c). In particular, adoption by Greece of a legal framework in April 2016 for implementing the principle of safe third country for asylum seekers has established the legal ground for most of the returns from the Greek islands to Turkey (*ibid.*). Furthermore, Greece introduced an initial inadmissibility test, i.e. a fast-track procedure, for the assessment of asylum claims (European Commission, 2016d). By doing so, the Greek asylum authorities have become “legally” capable to reject the application of asylum seekers without further investigation, if the authorities

decide that Turkey is a safe third country or first country of asylum for them, and to subsequently send them back to Turkey. On the other side, Turkey amended the TPR in order to accommodate and provide further formal safeguards for Syrian refugees by granting temporary protection even for the ones who (irregularly) crossed to the Greek islands after 20 March 2016 but sent back to Turkey (European Commission, 2016c). However, the advancement of assurances also for non-Syrians and ensuring the access of all returned refugees to the asylum procedure in Turkey have remained to be unrealized.

Greece may apply the principle of safe third country if its asylum authorities are satisfied that asylum seekers will be treated in line with the following principles in Turkey (Article 38(1), APD):

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined in the Qualifications Directive;
- (c) the prohibition of *refoulement* in accordance with the Refugee Convention is respected;
- (d) the prohibition of removal of the applicant to a country where he or she would face torture and cruel, inhuman or degrading treatment is respected; and
- (e) the possibility exists to claim refugee status, and if the applicant is found to be a refugee, to receive protection in line with the Refugee Convention.

The return of all asylum seekers (whose asylum applications are rejected) from Greece to Turkey on the ground that Turkey is safe for them brought into question as to whether Turkey is indeed safe. As of January 2019, more than 1,800 asylum seekers and refugees are returned to Turkey on the basis of the EU-Turkey Statement (UNHCR, 2019b). Scholars, politicians, and human rights organizations were concerned as to whether Turkey fulfills all of the criteria designated in the APD to determine a third country as safe. Meanwhile, on 22 September 2017, the Greek Supreme Administrative Court³⁵ held that Turkey is a safe third country for two Syrians, and upheld the decisions of the Asylum Appeals Committees in that their asylum applications were inadmissible (Amnesty, 2017; Tsilou, 2018). On the other side, the Asylum Appeals Committees overturned 390 out of 393 decisions of the Greek Asylum Service³⁶ that presume Turkey as a safe third country and that Turkey would offer adequate protection to asylum seekers who are returned to the country (Gkliati, 2017, p. 213). As the Committee ruled, “[safe third country] requirements were not fulfilled with respect to Turkey, essentially impeding the application of the EU-Turkey deal” (ibid.). While, the Greek authorities are not in cahoots as to the implementation of the safe third country rule to Turkey, the study now examines the five distinctive criteria as set out in Article 38(1) of the APD in the context of Turkey: is Turkey really a safe third country for asylum seekers (and first country of asylum for refugees)?

³⁵ The Supreme Administrative Court in Greece is the highest appellate court with regard to the decisions of administrative courts in the country (Amnesty, 2017).

³⁶ The Greek Asylum Service is the first instance institution in Greece to examine asylum and subsidiary protection claims, and on appeal they are assessed by the Greek Asylum Appeals Committees (Gkliati, 2017, p. 215).

a. *No threatening against life and liberty of asylum seekers and refugees (Article 38(1)(a), APD)*

As presented in *Section 3.1*, the rights to life and liberty are enshrined in various international human rights instruments including the ICCPR and the ECHR. Turkey ratified both the ICCPR (in 2003) and the ECHR (in 1954) (see *Section 4.3.2*). However, Turkish authorities' practices violating the rights of asylum seekers and refugees to life and to liberty in several occasions raised concerns among scholars, human rights organizations and observers. Despite Turkey's commitment to protect the rights of anyone in its territory or jurisdiction, its past and present practices comprise of violations vis-à-vis the rights of refugees and asylum seekers to life and to liberty.

First, several instances after the adoption of the EU-Turkey Statement at the Turkish-Syrian border have shown that the right of asylum seekers to life is infringed. According to the 2016 report of HRW on Turkey, some refugees attempting to cross from Syria to Turkey have been shot dead or beaten by Turkish border guards (HRW, 2016). A similar occasion transpired also in 2018, when Turkish border guards shot indiscriminately at Syrian asylum seekers, and killed ten of them, who were fleeing escalated violence to seek protection near the closed Turkish-Syrian border (HRW, 2018a). Such incidents occur recurrently at the Turkish-Syrian border, and in fact, the Syrian Observatory for Human Rights reported that by November 2017, at least 330 refugees had died while attempting to cross the Turkish-Syrian border (ibid.).

The indiscriminate shootings against Syrian asylum seekers at the border (i.e. just because they are Syrians attempting to cross the Turkish-Syrian border) indicate that their lives are threatened on account of their nationality. In addition, several of these shootings have resulted in deaths, which shows that their right to life is indeed violated, a right which is non-derogable even in times of war or emergency (Korff, 2006, p. 6). One may argue that such incidents do not even occur on Turkish territory and hence, there is no obligation to protect. However, Turkey in fact engages in human rights violations in contravention of Article 2 of the ECHR and Article 6 of the ICCPR as it exerts effective control³⁷ resulting in the violation of the right of Syrian asylum seekers to life.

Second, especially following the adoption of the EU-Turkey Statement, several detention and deportation centers have been established throughout Turkey in order to detain the asylum seekers and refugees with a view to preventing them from attempting to access the EU territory or sending some of them back to their countries of origin (Ataç et al., 2017). As all non-Syrian returnees in Turkey are deemed "irregular migrants," they are detained in deportation centers for the purpose of expulsion, and have no access to adequate information on the ways to seek protection in Turkey (idem, p. 15). Furthermore, there are several incidents with regard to human rights violations against refugees and asylum seekers in

³⁷ The ECtHR began to move towards a broader interpretation of jurisdiction by making clear that it is the exercise of "effective control" over a person by the state which is pivotal to determining jurisdiction (Mc Namara, 2013, p. 319).

deportation centers around Turkey (Amnesty, 2015a). For instance, eleven human rights organizations including Amnesty Turkey issued a press release in January 2016 asserting that asylum seekers and refugees who are under administrative detention in the deportation centers, including Aşkale Deportation Center (located in Erzurum, a city in the east of Turkey), are not allowed to reach out their families or lawyers (Amnesty, 2016). In addition, Aşkale Deportation Center is 85% EU-funded, hence, the EU connives at the measures taken by the Turkish authorities (Amnesty, 2015b). Such occasion coincided with the period between the activation of the JAP in November 2015 and the adoption of the EU-Turkey Statement in March 2016. Notwithstanding, the EU knowingly accepted to make a deal with a country, human rights records of which are not positive at all. Despite all of these concerns, poor conditions and deportation practices at the deportation centers in Turkey have perpetuated even after the EU-Turkey Statement (*Evrensel*, 2019). Therefore, the EU merely disregards, and even abets, human rights violations in these centers as the Member States provide financial support for these centers in Turkey (see *footnote 33*).

This being the practice in Turkey, as shown in *Section 3.1*, both Article 5 of the ECHR and Article 9 of the ICCPR prescribe that one can be deprived of his or her liberty only on the ground of his or her lawful arrest or detention. In the specific occasions above, there must have been a lawful ground for the detention of asylum seekers, and the detainees must have been promptly and adequately informed of the reasons of their detention. However, asylum seekers and refugees were detained in deportation centers merely because of their illegal entry and stay in Turkey (e.g. for the purpose of expulsion), and had no access to adequate information for their detention, or to a lawyer to challenge the decision on their detention, or on the ways to seek protection in Turkey. Hence, further guarantees under Article 5(2) of the ECHR and Article 9(2) of the ICCPR were also violated by the Turkish authorities. Similarly in *Abdolkhani and Karimnia v. Turkey* in 2009, the ECtHR ruled that Article 5 of the ECHR was violated, as the applicants were detained solely on the basis of their conviction of illegal entry to Turkey, were not provided the reasons of their detention, were unable to access to a lawyer and to challenge the unlawfulness of their detention.

As a result, the rights of many refugees and asylum seekers to life (Article 2, ECHR; Article 6, ICCPR) and to liberty (Article 5, ECHR; Article 9, ICCPR) at the Turkish-Syrian border and in Turkey are violated. As can be observed from these occasions, there is no guarantee for the migrants who are returned from the Greek islands to Turkey that their rights to life and to liberty will be respected and protected. Even if not now, further cases may be brought against Turkey at the ECtHR due to similar rights violations against asylum seekers and refugees arising from the implementation of the EU-Turkey Statement.

b. No risk of serious harm against asylum seekers and refugees as defined in the Qualifications Directive (Article 38(1)(b), APD)

According to Article 15 of the Qualifications Directive, “serious harm” consists of (a) death penalty or execution; or (b) torture et al. of an asylum seeker in the country of origin; or (c) serious and individual

threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. As Turkey abolished death penalty in 2004, and currently it is not in a situation of international or internal armed conflict, Article 15(a) and (c) are not a matter of concern as to the risk of serious harm against asylum seekers and refugees. In addition, as addressed by the Greek Supreme Administrative Court in its decision on 22 September 2017, Article 15(b) of the Qualifications Directive concerns Article 3 ("prohibition of torture") of the ECHR in the context of detention and deportation centers in Turkey. Therefore, the analysis below addresses the risk of violation of Article 3 of the ECHR, but only on the basis of "inhuman or degrading treatment" due to detention and living conditions in these centers.

Several human rights organizations and the CPT have witnessed poor detention conditions around Turkey. Already in their press release in 2016, Amnesty Turkey asserted that neither national nor international human rights obligations are respected in the deportation centers, and condemned the measures used to "deter" asylum seekers and refugees who are under administrative detention in these centers (Amnesty, 2016). According to the CPT report published on 17 October 2017, foreign nationals who are kept in the detention centers around Turkey encounter conditions that can qualify as inhuman and degrading, especially owing to overcrowding and poor state of hygiene (CoE, 2017). With regard to various other occasions in different years, several NGOs raised their concerns over the conditions at the deportation centers in Turkey, as asylum seekers and refugees do not have access to certain other rights, suffer from poor conditions, and are often subject to ill-treatment (Amnesty, 2015a, 2015b; *Evrensel*, 2019). In some cases, Syrian refugees fleeing violence in the border cities with to seek refuge near the Turkish border are beaten and detained, abused and subjected to mistreatment by Turkish border guards (HRW, 2018a).

Article 3 of the ECHR strictly prohibits the subjection of persons to torture or to inhuman or degrading treatment or punishment. Especially those who are arrested or detained under the full control of the state authorities are the most vulnerable to be subjected to inhuman or degrading treatment (Reidy, 2002, p. 22). Therefore, Article 3 provides certain safeguards also to foreigners (including asylum seekers and refugees) present in a Contracting State, and their protection from torture et al. shall be respected by the state authorities when they are under detention. For instance in *M.S.S. v. Belgium and Greece* in 2011, the ECtHR ruled that Article 3 ("prohibition of inhuman or degrading treatment or punishment") of the ECHR was violated due to the poor living conditions faced by the applicant in detention centers in Greece. As the Court held, the applicant in particular, and asylum seekers in Greece in general, are systematically subjected by Greece to poor living and detention conditions at the reception centers that are degrading, and are not informed of the reasons of their detention (ECtHR, 2011). Since the Court particularly underscored the vulnerability of asylum seekers in Greece, this may have broader implications at European and international levels regarding the detention and reception conditions of migrants. In the specific incidents raised above, asylum seekers who are under detention in Turkey also encounter poor detention conditions which can be

deemed inhuman and degrading. As the incidents demonstrate, asylum seekers and refugees are under the risk of serious harm with regard to inhuman and degrading treatment by the Turkish authorities, especially when under detention, and there is no guarantee for the returnees from the Greek islands that they will not be subjected to similar or worse kind of treatment.

In contrast, the EU and Member States connive at the fact that Turkey does not provide certain safeguards against the risk of serious harm to asylum seekers and refugees. For instance, in its ruling on 22 September 2017, the Greek Supreme Administrative Court found that “the allegations of Turkey’s practice of administrative detention of Syrians returning from Greece were unsubstantiated,” and approved the decision of the Appeals Committee (ECRE, 2017). In addition, it declined an argument raising the risk of violation of Article 3 of the ECHR due to detention and living conditions in Turkey (ibid.). However, when implementing the safety criteria in the context of Turkey, the Appeals Committee relied heavily on the assurances that may be deemed nonobjective (ibid.).³⁸ Whereas the NGO reports could have been taken into consideration as reliable sources of evidences as the ECtHR did in the *M.S.S.* case (see *footnote 9*). While it is a crystal-clear fact that human rights conditions in Turkey increasingly worsen, especially after the failed coup attempt on 15 July 2016,³⁹ the impartiality of these evidences must be questioned. Ultimately, the EU merely disregards the risk of human rights violations against potential returnees in Turkey. In fact, the Union is complicit in such violations, as Turkey increasingly toughens its measures against asylum seekers and refugees to prevent their access to the EU by virtue of the financial assistance provided to Turkey under the EU-Turkey Statement (see above and *footnote 33*).

c. *Respect for the prohibition of refoulement (Article 38(1) (c) and (d), APD)*

In this section, Article 38(1)(c) and (d) of the APD are addressed together. This is because the prohibition of *refoulement* in most cases protects asylum seekers and refugees also from the risk of torture et al. in the country to which they are expelled or returned (see *Section 3.3*).

In practice, several NGOs documented in the last few years that the Turkish authorities engage in practices that violate the prohibition of *refoulement*. Already in mid to late 2015, in parallel with the EU-

³⁸ The assurances consist of the letters between the Permanent Representative of Turkey to the EU and the Director-General for DG Migration and Home Affairs of the European Commission, between the Director-General and the Greek authorities, and the letter of the UNHCR to the Greek authorities (ECRE, 2017).

³⁹ On 21 July 2016 following the attempted coup, the Turkish government promulgated a nationwide state of emergency, which was extended seven times and lasted two years in total (*BBC*, 2018). Turkey enunciated its derogation from the implementation of the ECHR under Article 15 of the Convention (ECtHR, 2018). In addition, tens of thousands of people, including academicians, journalists, public officials, military personnel – who allegedly are supporters of the “FETÖ” terrorist organization were arrested or dismissed from their jobs (*BBC*, 2018). During the state of emergency, 31 decrees have been enacted, none of which have been subject to parliamentary scrutiny, to judicial review or to a decision by the Constitutional Court (European Commission, 2018c). While these emergency decrees have curtailed certain civil and political rights, they also amended some core pieces of legislation (including the criminal procedure code) – the effects of which continue even after the lifting of the state of emergency (ibid.).

Turkey migration talks, reports have indicated that the Turkish authorities transferred refugees and asylum seekers to detention centers where they were kept incommunicado, and some were forcibly transferred back to the countries they had fled (Amnesty, 2015a) in violation of the prohibition of *refoulement*. Amnesty (2015b) further reported that “the Turkish authorities began detaining and deporting refugees and asylum-seekers on a scale not previously seen.” Since at least mid-August 2015, the Turkish authorities have been engaging also in the *non-entrée* policies at the Turkish-Syrian border, which involved the expeditious push-back of Syrian refugees who attempt to cross from Syria to Turkey (HRW, 2016, 2018a). In more recent instances and especially in April and May 2016, right after the adoption of the EU-Turkey Statement, HRW (2018a) documented that Syrian asylum seekers who managed to cross into Turkey were *summarily returned* to Syria (emphasis added). While refugees arriving at the Turkish-Syrian border are merely expelled from reaching Turkish territory, several other NGOs reported that those who are held at the deportation centers around Turkey (after being captured at the time they attempt to cross into Greece) are also forced to return to their countries of origin (Evrensel, 2019).

To recall Article 33 of the Refugee Convention, “[n]o Contracting State shall expel or return (“refouler”) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (emphasis added). Similarly, Article 3 of the ECHR bars Contracting States from engaging in the violation of their obligation of *non-refoulement*. Both Article 33 of the Refugee Convention and Article 3 of the ECHR strictly prohibit the Contracting States from *refoulement* of refugees to the countries where their life or freedom would be jeopardized on various grounds.

The incidents raised above indicate that the practices of Turkish authorities jeopardize these safeguards. First, as the *non-entrée* policies or summary returns at the Turkish-Syrian border coerce asylum seekers and refugees to return to a country where their life or freedom would be in threatened, Turkey breaches its obligation of *non-refoulement*. As to the summary returns, den Heijer (2010, pp. 188-189) rightly argues that a duty of admittance to the state territory must at all times be involved. Once a refugee, whether legally or irregularly, attempts to enter into a state territory other than his or her country of origin, or in some circumstances into a state’s jurisdiction, the Turkish authorities must first admit he or she into the state territory instead of removing them therefrom, and then commence the procedure to examine as to whether he or she is in need of protection.

Second, with regard to the instances where the deportation of refugees from within Turkey to a country in which their life or freedom would be threatened, Turkey disregards its obligation of *non-refoulement*. Already in several cases, the ECtHR found that Turkey was in violation of Article 3 of the ECHR. The Court established in *Jabari v. Turkey* in 2000 that the risk of deportation of the applicant to Iran (her country of origin), and in *Abdolkhani and Karimnia v. Turkey* in 2009 that the deportation of the

applicants to Iraq or Iran would be in violation of Article 3 of the Convention. Therefore, although there is no “obligation to grant asylum” in international law, Turkey must at least comply with its obligation of *non-refoulement*. However, rather than allowing the refugees or asylum seekers at the Turkish-Syrian border in Turkish territory or refraining from the practices of deportation, and initiating the procedure to grant them at least temporary protection or conditional refugees status, the practices of Turkish authorities focus solely on repulsing them back to war and persecution. As the case-law of the ECtHR and the incidents above indicate, the protection of asylum seekers and refugees in Turkey from *refoulement* has been at stake from the outset, and there is no guarantee for the returnees from the Greek islands that it will be respected.

On the other side, the absolute nature (*jus cogens*) of Article 3 of the ECHR and Article 33 of the Refugee Convention implies that the principle of *non-refoulement* must at all times be respected. In the incidents raised above, while one may argue that Turkey has the sovereign right to protect its borders and to have control over its territory, this right is not unlimited or absolute. It does not justify serious human rights violations against asylum seekers and refugees at the Turkish-Syrian border and in the deportation centers in Turkey. Therefore, protection of a state’s sovereign control over its territory and borders must not contravene its obligation which has a *jus cogens* nature.

It is evident that Turkey does not respect the principle of *non-refoulement* (as enshrined in the Refugee Convention and the ECHR – all of which are ratified by Turkey). When substantiating Article 38(1)(c) and (d) of the APD in its decision on 22 September 2017, the Greek Supreme Administrative Court dismissed the position that Turkey does not respect the principle of *non-refoulement* (ECRE, 2017). In this respect, the Court relied on the large number of Syrian refugees held in Turkey (*ibid.*). However, this reasoning is problematic. Indication of the large number of refugees in the country is indeed an indicator of the lack of burden-sharing under international refugee law. As a matter of fact, the implementation of the EU-Turkey Statement put ominous pressure on Turkey as to the management of migration within and from the country. In order to prevent further movements from the country to the EU, Turkey has tightened its border controls. In addition, the country has been engaging with harshened practices against asylum seekers and refugees, which, as shown above, lead to human rights violations, and in particular, to the violation of the principle of *non-refoulement*. Hence, despite the promise of the Statement that the returns will take place in full accordance with EU and international law and of the respect for the prohibition of *refoulement*, in practice it falls short of providing such guarantees.

d. *Existence of the possibility to claim refugee status and to receive protection in line with the Refugee Convention (Article 38(1)(e), APD)*

The last criterion laid down in Article 38(1) of the APD to determine whether a third country is safe is that “the possibility exists to claim refugee status, and if the applicant is found to be a refugee, to receive protection in line with the Refugee Convention.” Therefore, it is crucial in the third country (which

will be designated as safe for an asylum seeker) whether in the current context, an asylum seeker (who will be returned to that third country) will be allowed to request refugee status, and if he or she is found to be a refugee, will access to protection in accordance with the Refugee Convention (UNHCR, 2016b). This provision is construed by the UNHCR (2016b) that access to refugee status and to rights enshrined in the Refugee Convention must be ensured both in law, including the ratification of the Refugee Convention, and in practice. The analysis examines Article 38(1) of the APD in two parts: (1) access to refugee status in law and in practice; and (2) access to rights enshrined in the Refugee Convention in law and in practice.

(1) Access to refugee status in law and in practice

The right to asylum in human rights law and international refugee law is not safeguarded in a binding international legal instrument (see *Section 2.4*). In this regard, entitlement to such right pursuant to UDHR (Article 14) does not mean anything to states so long as they do not assume an “obligation to grant asylum.” Furthermore, while the only binding major safeguard for asylum seekers and refugees from persecution at international level remains to be the principle of *non-refoulement*, it does not ensure whether an asylum seeker will be granted a refugee status, nor fully guarantee that they will not be expelled or returned to a country where their life or freedom would be threatened (see above).

Whilst this is the current international regime of refugee protection, refugee protection in Turkey too involves perplexities, and in fact, bifurcations (see *Section 4.3.1*). As Turkey ratified the Refugee Convention with a geographical reservation, it only recognizes Europeans as refugees. This bifurcation is reflected in national law (see *Table 1*). First, Turkey distinguishes Europeans and non-Europeans, Syrians and non-Syrians (among non-Europeans). This bifurcation brings us to the second distinction, which is embodied in the level of protection granted to asylum seekers based on their countries of origin. According to the LFIP, refugee status is granted only to Europeans, and renders them eligible for protection under the Refugee Convention. Whereas non-Europeans, except Syrians, can be granted conditional refugee status. What is not codified in the LFIP is temporary protection, which is incorporated into the TPR and can be granted only in the situations of migration *en masse*. Syrian refugees are given temporary protection status, which provides only for restricted protection (see *Section 4.3.1.b*). In addition, the TPR sets out that the application of Syrians for international protection shall not be not processed (Article 16, Provisional Article 1). Therefore, what matters to Turkey when granting protection under the Refugee Convention is the country where a refugee or an asylum seeker originate from, and not his or her vulnerability in the first place.

As the previous paragraphs summarized who can access to refugee status in Turkey and on what legal grounds, the analysis now focuses on the practice side in Turkey. In practice, as many scholars and NGOs raise their concerns, Turkey lacks providing effective protection both for Syrians and non-Syrians. While many non-Syrian returnees from the Greek islands since 4 April 2016 have been detained in

deportation or detention centers in Turkey without access to asylum procedures, there is limited or no access to temporary protection for many Syrians given the high number of Syrians in Turkey (HRW, 2018d; PRO ASYL, 2016). Furthermore, the UNHCR announced in September 2018 that it finalized its registration activities for non-Syrian applicants for international protection in Turkey (ECRE, 2018b). Therefore, neither Syrians nor non-Syrians returned from the Greek islands to Turkey are provided a guarantee for their access to protection in Turkey (PRO ASYL, 2016, p. 6).

This being the case, while many asylum seekers and refugees are under detention in the centers around Turkey, they are also not provided access to information about the ways to seek protection as set out in Turkish law (see *Section 4.3.2*). For instance, the LFIP provides all foreigners in Turkey for the right to access to lawyer and to information about his or her detention (Article 68(4), LFIP), there is no explicit provision prescribing their access to information about the asylum system in Turkey. In contrast, Article 19 of the TPR explicitly set out that “[those eligible for temporary protection] shall be informed on the process related to temporary protection, their rights and obligations and other issues in a language they can understand.” What happens in practice is that non-European asylum seekers and refugees under detention are not duly informed about their rights, and many of them do not know that they could lodge an asylum application and request for free legal assistance against their detention, rejection or deportation (PRO ASYL, 2016, p. 8). Especially those under detention, therefore, are not aware of their rights (e.g. about the reasons of their detention, how to apply for protection in Turkey) nor they have access to asylum. Hence, it is highly doubtful as to whether all migrants returned from the Greek islands under the EU-Turkey Statement are able to access the asylum system in Turkey. In fact, it is very likely that they may either be detained or sent back to their countries of origin (Ataç et al., 2017).

(2) Access to rights in line with the Refugee Convention in law and in practice

It is presented above that non-Europeans in Turkey lack access to refugee status, both in law and in practice. The analysis now turns to what rights under the Refugee Convention are granted to those who can access to refugee status in Turkey, and what other rights may be afforded under Turkish law for those cannot access to refugee status under the Convention.

As presented in *Section 3.4*, the Refugee Convention obliges the Contracting States to grant the secondary rights enshrined in the Convention to those who are granted refugee status. Once a refugee accesses to a state jurisdiction, he or she shall be protected from *refoulement*, and provided access to asylum. If he or she is granted a refugee status under the Refugee Convention after a status determination process, he or she will have access also to the secondary rights thereunder. However, on the domestic law side, states possess the sovereign right to grant or not to grant these rights to refugees, which also affect the secondary rights granted to refugees.

Although Turkey ratified the Refugee Convention, the rights enshrined therein can be granted by the Turkish authorities only to European refugees. In contrast, non-European asylum seekers do not have access neither to a refugee status, nor to the secondary rights prescribed under the Refugee Convention. Instead, their rights are laid down under the TPR (for Syrians) or the LFIP (for non-Syrians) (see *Section 4.3.2*). This, however, brings into question as to whether they will access to quality protection (see *footnote 29*). Indeed, by externalizing the migration management to safe third countries like Turkey, the EU highly influences the scope and level of rights awarded to refugees and asylum seekers.

Syrians who are under temporary protection status are entitled to rights codified in the TPR. Their illegal entry into or stay in Turkey is subject to the principle of non-penalization (Article 5, TPR), they shall be protected from *refoulement* (Article 6, TPR), and they may be provided with services including health, education, access to labor market, and social assistance (Article 26 *et seq*, TPR). However, if they do not comply with their obligations (e.g. if they move outside a temporary accommodation center), their access to certain rights (saving education and emergency health services) may be restricted (Article 35, TPR). In practice, many Syrians have issues in accessing these rights. First, over 380,000 Syrian refugee children (out of 1.2 million Syrian refugees who are aged under 18) in Turkey lack access to education (UNICEF, 2017). In addition, as the language of instruction in Turkish schools are in Turkish, Syrian refugees have hardships in understanding the lectures (Carlier, 2018, p. 8). Second, by the end of 2017, only 1.2 per cent of Syrian refugees (out of 1.7 million Syrian refugees aged between 19 and 64) in Turkey were provided work permits (ECRE, s.a.). This not only shows the fact that the guarantees under the TPR do not function in practice, but also that the majority of Syrian refugees in Turkey are deprived of some of their fundamental rights (e.g. their access to education is limited, they are employed in the informal market, under minimum wage and in poor conditions).

As for non-Syrians who are granted conditional refugee status, the LFIP lays down a set of rights. All foreigners within the scope of the LFIP, including conditional refugees, shall be protected from *refoulement* (Article 4, LFIP), and shall have access to courts against detention decisions (e.g. Articles 57(6) and 68(7), LFIP). In addition, international protection applicants shall benefit from non-penalization on the account of illegal entry or stay (Article 65, LFIP). More specifically, international protection beneficiaries in Turkey, including those who are granted conditional refugee status, shall have the rights to access to education (Article 89(1), LFIP), and access to primary health care (Article 89(2), LFIP). On the other side, while European refugees in Turkey are afforded a more extensive right to access to labor market, and may work “upon being granted the [refugee] status,” a conditional refugee may apply for a work permit only after six months following the filing of his or her international protection claim (Article 89(4), LFIP). Therefore, as argued further below, the bifurcation regarding the rights of non-Syrians in Turkey, just like the non-existence of the possibility for them to obtain a refugee status in Turkey, is retained.

Despite the codification of these rights, including the protection from *refoulement*, access to courts, non-penalization of illegal entry or stay, and access to education and basic health care; non-Syrian refugees are deprived of certain set of these rights. As discussed previously under this *Section 5.1.1*, both Syrians and non-Syrians in Turkey face the risk of *refoulement*, their access to courts is restricted, and many of them are detained solely on the ground of their illegal entry or stay in Turkey and in inhumane or degrading conditions. In addition, non-Syrians are unable to choose the city they want to reside, as they are assigned to a satellite city by the Turkish authorities and restricted from movement outside such city (see *Section 4.3.1.b*). Thus, their freedom of movement is restricted to a great extent. In addition, codification of the right of non-Syrians to access to the labor market in the LFIP does not guarantee such access, as their access may be restricted based on “certain circumstances in the labor market and related developments” (İçduygu & Diker, 2017, p. 17). Similar to Syrian children’s circumstance, the access of non-Syrian children to education is highly restricted (Refugees International, 2017). As the language of instruction in public schools is in Turkish, non-Syrian children also have challenges in exercising their right to education. As a result, while many Syrians and non-Syrians in Turkey face the fear and risk of *refoulement*, unlawful detention under poor conditions and with the lack of communication with outside world, they also lack access to refugee status under the Refugee Convention and the secondary rights enshrined therein and under Turkish law, both in law and in practice.

(3) Conclusion for Article 38(1)(e) of the APD

As shown above, Turkish asylum regime does not ensure access of non-Europeans to refugee status and to rights in line with the Refugee Convention. This is the case both in law and in practice. First, Turkish asylum regime involves bifurcations due to its ratification of the Refugee Convention with a geographical restriction. Second, non-Europeans are precluded from accessing to a refugee status under the Convention and the rights thereunder in Turkey, as well as other guarantees set out under Turkish law by way of legal arrangements and/or in practice. Despite this crystal-clear fact, the Greek Supreme Administration Court held otherwise on 22 September 2017. As to Article 38(1)(e) of the APD, the Court construed the “protection in line with the Refugee Convention” as not requiring the third country to have ratified the Convention, and without geographical restriction, or to have a refugee protection regime guaranteeing all the rights enshrined in the Convention (ECRE, 2017). Rather, it is sufficient for the Court that the third country that is designated as safe has “adequate” protection regime ensuring certain fundamental rights to refugees in the country, including the rights to health care and to employment (ibid.).

What the Court did not take into consideration, however, is that as analyzed thoroughly above, access of non-European asylum seekers and refugees to “protection in line with the Refugee Convention” in Turkey is not possible in law and in practice. Although certain safeguards with regard to the access of non-Europeans to some sort of protection and to a set of rights are laid down in the LFIP and the TPR, they

are not in line with the Refugee Convention, nor they are fully implemented in practice. As two judges at the Greek Supreme Administration Court also dissented in their opinion, Turkey lacks providing “adequate protection” *inter alia* to Syrian refugees (ibid.). In fact, the TPR prevents Syrians from applying for international protection due to the geographical limitation. Furthermore, as the judges further asserted, temporary protection is not “in line with the Refugee Convention” as it leads to “a mass, non-individualized status revocable at any point by a decision of the Council of Ministers [of Turkey],” which also disregards all rights and entitlements afforded to refugees under the Refugee Convention (ibid.). The conditional refugee status that may be provided to non-Syrians is *a fortiori* not in line with the Refugee Convention, as it entitles non-Syrian refugees to less qualified protection under the LFIP.

This, *inter alia*, brings us to the conclusion that Turkey cannot be considered a safe third country under Article 38(1)(e) of the APD for migrants to be returned from the Greek islands. This is because Turkey does not fulfill the criterion (e) since there is no possibility to claim refugee status, or to receive protection “in accordance with the Refugee Convention.” Before considering Turkey as such, “Turkey must allow, in accordance with rules laid down in national law, non-European nationals or stateless persons ... to request refugee status and to have access to all rights conferred by the 1951 Convention” (UNHCR, 2016, p. 6). What is *ought to be* in this regard is that Turkey must terminate the bifurcations as to the access of non-European asylum seekers and refugees to asylum and to their rights, both in law and in practice. The Greek authorities, on the other side, must assess the individual claims more thoroughly by considering all possible evidences and on a case-by-case basis as prescribed under Article 38(2)(b) of the APD.

5.1.2. Readmission to Turkey

As presented above, Greece has commenced the return of the migrants (who do not apply for asylum or whose asylum applications are declared inadmissible) from the Greek islands to Turkey as of 20 March 2016. In this regard, the analysis now turns to the Greek side to examine how effective the asylum applications of those migrants are processed. To do so, it argues whether the access of these migrants to asylum (i.e. to a refugee status under the Refugee Convention), and to the rights thereunder, is jeopardized by the Greek authorities by (1) exposing the migrants arriving on the Greek islands to a deficient asylum system, regardless of their vulnerability, and (2) subsequently returning them to Turkey by way of readmission, where the possibility to access to protection in line with the Refugee Convention does not exist. In addition, it discusses whether such returns jeopardize the protection of these migrants from *refoulement*.

a. Access to asylum and to the secondary rights in the Greek hotspots

Despite the fact that the EU-Turkey Statement has made the greatest contribution in restraining the movement of migrants from Turkey to Greece, such movements have not stopped completely. As discussed

in *Section 4.3.3.b*, although the number of sea arrivals at the Greek islands has dropped to a large extent following the adoption of the JAP and the EU-Turkey Statement, monthly crossings from January 2017 to January 2019 fluctuated between 1,089 (February 2017) and 4,886 (September 2017) (see *Figure 1* below). When looking at the big picture, the total number of sea arrivals via the Eastern Mediterranean route plunged sharply from 885,386 in 2015 to 173,450 in 2016 (Frontex, 2016) and to 29,718 in 2017, and increased to 32,494 in 2018 (UNHCR, 2019a). Therefore, the Greek islands has continued to take in “new-comers” crossing from Turkey. While it is stated by the European Commission (2016d) that all migrants on the Greek islands were moved to the mainland before 20 March 2016, a considerable number of the newcomers have remained to stay on the islands in the so-called hotspots. As of January 2019, total number of refugees and asylum seekers in Greece is 71,200 – 14,600 of which are on the islands (UNHCR, 2019c). Therefore, despite the rationale of preventing the access of (irregular) migrants to the EU territory (see *Section 4.2.2*), the EU-Turkey Statement could only decrease the number of crossings from Turkey to Greece.

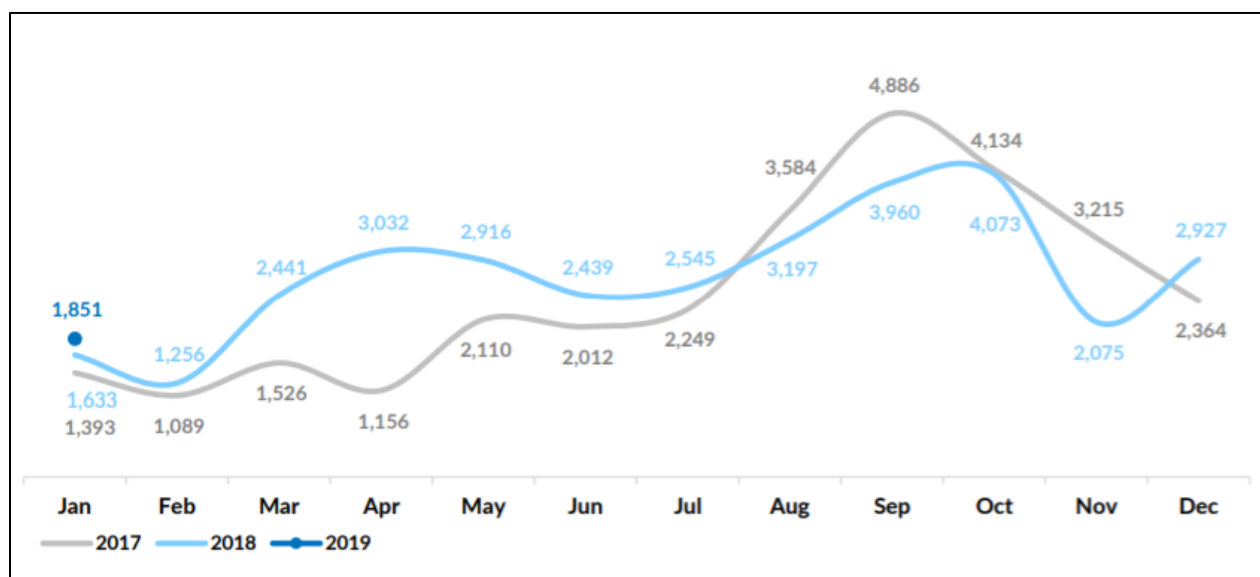


Figure 1. Number of monthly arrivals to the Greek islands from January 2017 to January 2019 (UNHCR, 2019a).

The establishment of the hotspots in Greece has been the embodiment of the EU’s response to the migration *en masse* that transpired throughout the summer of migration in 2015 (see *Section 4.3.3.a*). The current number of hotspots in Greece is five, which are situated on the islands of Chios, Kos, Leros, Lesbos, and Samos (European Parliament, 2018, p. 3). After 20 March 2016, migrants arriving at the Greek islands were detained on these hotspots to facilitate their readmittance to Turkey (idem, p. 4). In May 2018, while the total reception capacity in these five hotspots was 6,458; the number of occupancy was much higher with 15,201 migrants (idem, p. 3). However, it has become clear that the living conditions and the capacity of reception centers in the hotspots have not been enhanced over the past few months.

Apart from all of the statistics indicated above, there is a reality that those remaining on the Greek islands encounter harsh conditions in the hotspots for lengthy periods. As reported by ESI (2018, p. 4), the average duration of stay on the islands has been four or five months in 2017. In January 2019, Oxfam (2019, p. 4) noted that many asylum seekers at the hotspots wait for years for the processing of their claims, and the majority of them are not allowed to leave the islands. Especially due to the lengthy administrative procedures, returns from Greece to Turkey have also been slow (European Parliament, 2018, p. 4). The majority of the asylum seekers, are those considered as vulnerable⁴⁰ (European Parliament, 2018; Oxfam, 2019). While it is highly crucial for migrants who are in vulnerable circumstances to undergo a vulnerability assessment in the first place, human rights organizations at the hotspots have witnessed the lack of qualified staff – leading to the failure to identify and support for the most vulnerable migrants (HRW, 2018b; Oxfam, 2019). Furthermore, rather than assessing their claims pursuant to the normal asylum procedure⁴¹ in Greece by taking “the unique and individual circumstances” of each migrant into account (UN HRC, 2017), vulnerable migrants are also subjected to a fast-track procedure with a view to returning them to Turkey as soon as possible (Oxfam, 2019). As a result, asylum seekers on the Greek islands are in limbo for months, or even years, without access to certain rights, while awaiting for the handling of their asylum applications.

In the Greek hotspots, the poignancy of asylum seekers due to the lack of access to asylum for extensive periods is aggravated further with the destitution of some of their basic human rights. As human rights organizations (e.g. HRW (2018b), Oxfam (2019)), the European Parliament (2018) and the CoE (2018a) raised their concerns, migrants are hosted in very poor living conditions (which may be considered as inhuman and degrading) in detention and reception centers (at the hotspots), and without being informed of their status or the reasons of their detention. Migrants, especially those who are in vulnerable circumstances, have difficulties in accessing to basic services, are exposed to overcrowded, unsafe and unhygienic reception conditions, and are physically or verbally abused or otherwise mistreated by the Greek police (CoE, 2018a; HRW, 2018b; Oxfam, 2019). As long as the waiting period of migrants on the islands is extended due to the processing of their claims, they are exposed more to human rights violations.

While this is the reality in Greece, what is ought to be is that the rights of migrants on the islands must be respected. As Greece ratified numerous international and regional human rights treaties, including

⁴⁰ The concept of a “migrant in a vulnerable situation” may be involve situational vulnerability, or individual vulnerability (UNHCR, 2017, p. 2). Situational vulnerability connotes the risks occurring in the countries of origin, *en route* or in the countries of destination, for instance when migrants pursue irregular routes resulting in abuse by smugglers or bodily damage or damage to their vessels (*ibid.*). Whereas individual vulnerability may involve individual circumstances placing a person at risk, for instance disabled persons, older people, unaccompanied children, pregnant women, victims of torture or sexual violence (HRW, 2018b; Oxfam, 2019; UNHCR, 2017).

⁴¹ Greek law provides safeguards for migrants in vulnerable situations, i.e. they are exempt from the admissibility interview in the first place (Oxfam, 2019). However, in order for them to undergo this peculiar process, they must be primarily identified as vulnerable.

the Refugee Convention (1960; 1968) and the CFREU, it assumes to comply with all of its obligations thereunder and ensures to protect the rights of refugees and asylum seekers who are present in its territory.

In practice, however, there is no binding right to asylum under the Refugee Convention, and Article 18 under the CFREU does not impose anything than a procedural right to seek asylum (although the CFREU is binding on EU Member States). As the right to asylum is not guaranteed in a legally binding international treaty, granting an asylum to a protection seeker may be procrastinated by the state authorities, at their sole discretion. In this regard, Greece does not assume an obligation to grant asylum vis-à-vis asylum seekers at the hotspots. In fact, the asylum procedure in Greece fails to meet the requirements of international and European law. As the processing of asylum applications lodged at the Greek hotspots takes months, or even years; the access of asylum seekers in the hotspots to asylum is sidestepped. During such an extended process, asylum seekers are also deprived of access to information concerning the Greek asylum procedure. However, already in *M.S.S.* case, the ECtHR (2011) held that the Greek asylum system involves numerous structural and procedural shortcomings, especially as to access to the asylum procedure, to information regarding such procedure, and to legal aid, as well as regarding the assessment of asylum applications. These deficiencies have still not been remedied by Greece, and even the migrants considered as the most vulnerable cannot be identified and are subject to an initial inadmissibility test (see above). While this is the case with respect to the lack of access to asylum in Greece due to the prolonged administrative procedures, asylum seekers are deprived also of the secondary rights set out under the Refugee Convention, as they are not granted a refugee status thereunder by Greece or another EU Member State.

b. Access to asylum and protection from refoulement versus returns to Turkey

The returns from the Greek islands are contingent upon various legal frameworks. In particular, the return of migrants under the EU-Turkey Statement as of 20 March 2016 is based on the bilateral Greek-Turkish Readmission Agreement (until 1 June 2016) and the EU-Turkey Readmission Agreement (as of 1 June 2016) (European Commission, 2016c, 2016d).

If a migrant does not lodge an asylum claim on the Greek islands, or if an applicant is found to have departed from Turkey with an inadmissibility decision, he or she may be returned to Turkey pursuant to the EU-Turkey Statement. The latter is based two possibilities: applications may be deemed by the Greek authorities inadmissible on the ground that Turkey is a safe third country (if the applicant is an asylum seeker) or a first country of asylum (if the applicant is a refugee in Turkey). As of January 2019, more than 1,800 asylum seekers and refugees are returned to Turkey on the basis of the EU-Turkey Statement – the majority of which had no will to apply for asylum or whose claims were found to be inadmissible at second instance (UNHCR, 2019b). As of April 2018, a total of 12,569 migrants have returned “voluntarily” to Turkey from both the Greek islands (over 2,400 migrants) and mainland of Greece (European Commission,

2018b). Among these returnees, majority of them are Pakistani (39 per cent) (UNHCR, 2019b) – who are considered non-European, and are eligible only for conditional refugee status in Turkey.

If migrants were not returned to Turkey on the basis of an inadmissibility decision, they would have the possibility to access to quality protection in an EU country, or at least be able to render their individual cases to be assessed in substance (i.e. on the merits). As argued in *Section 4.2.5.b*, migrants who would otherwise have the possibility to access to asylum procedures, social support, and congruous reception conditions in other EU Member States are often expelled to countries of first arrival (e.g. Greece) or transit (e.g. Turkey) which have relatively less capacity to safeguard protection of human rights in line with international standards (Frelick et al., 2016, 190-191). Since all EU Member States ratified the Refugee Convention without reservations, the scope and level of rights afforded from an EU Member State to refugees would be more extensive than those that would be granted from Turkey. Thus, the quality of protection is highly affected if an asylum seeker or refugee is returned from an EU Member State to a safe third country which is in fact not safe (see *Section 5.1.1* above). As the majority of the returnees arriving at the Greek islands are non-Syrian asylum seekers (UNHCR, 2019b), it is highly doubtful as to whether they will have access to quality protection, or access to a refugee status in line with the Refugee Convention, in Turkey if they are granted a conditional refugee status by the Turkish authorities.

Indeed, readmission prevents the access of asylum seekers and refugees to the EU territory and to asylum in an EU Member State. As the EU, and Greece in particular, move the management of migration beyond their territories, and towards Turkey by virtue of the EU-Turkey Readmission Agreement; refugees and asylum seekers may never reach the EU territory again (Gammeltoft-Hansen, 2011b, p. 28). As a result, they are hampered from accessing to asylum, or a refugee status under the Refugee Convention. As asylum seekers who are returned to Turkey pursuant to readmission are precluded from accessing to asylum, they are also deprived of the secondary rights enshrined in the Refugee Convention. As a matter of fact, the secondary rights under the Refugee Convention can only be accessed if a refugee is granted a legally recognized status thereunder (see *Section 3.4*). As Gammeltoft-Hansen (2011b, p. 28) argues, the rights enshrined in the Refugee Convention are afforded “not *en bloc* but progressively, according to the ‘level of attachment’ a refugee obtains to a given country.” In order to access to more substantial rights including access to welfare, to labor market, to legal aid; a refugee must be lawfully stay in the EU territory (ibid.).

In addition, whenever Greece returns an asylum seeker to Turkey on the basis of the concepts of first country of asylum and safe third country and pursuant to the EU-Turkey Readmission Agreement, it may violate the prohibition of *refoulement*. As Greece ratified numerous international and regional human rights treaties, including the Refugee Convention (1960; 1968) and the ECHR (1974); it assumes to comply with all of its obligations under these conventions and ensures to protect the rights of everyone, including those who do not possess the Greek citizenship. In this regard, Article 33 of the Refugee Convention,

whether a state is party to the Convention or not, and Article 3 of the ECHR provide protection against both indirect and direct *refoulement* (see *Section 3.3*). In fact, Greece may engage in both direct and indirect *refoulement* when it returns the asylum seekers to Turkey without a serious examination of their asylum claims on the merits. This has been established by the ECtHR in several cases. In *T.I. v. United Kingdom* and *Hirsi Jamaa and Others v. Italy*, the ECtHR underscored that the Contracting States are under an obligation to ensure that persons will not be subjected to treatment in violation of Article 3 of the ECHR in the countries to which they are returned (i.e. direct *refoulement*) or that an intermediary country will not violate the protection of persons from *refoulement* by transferring them to a country where their life or freedom would be jeopardized (i.e. indirect *refoulement*).

First, as Turkey itself threatens the life or freedom of asylum seekers and refugees in the country (see *Section 5.1.1* above), there may be a ground for Greece's engagement in direct *refoulement* when it returns the migrants on the Greek islands to Turkey. This is because there is a high risk that the returnees will encounter ill-treatment by the Turkish authorities and detention in degrading conditions. Despite this bare fact, the Greek authorities have been returning thousands of asylum seekers to Turkey pursuant to the EU-Turkey Statement, or intercepting them at the Greek-Turkish border (see *Section 5.1.3* below).

Second, Greece may engage in indirect *refoulement* when it returns the migrants to Turkey as Turkey subjects asylum seekers and refugees to the risk of expulsion or return them to the places where they would face similar or worse kind of threat. As addressed by Poon (2016), an EU Member State may violate the prohibition of *refoulement* indirectly where it transfers an asylum seeker to a safe third country, and where it “knew or ought to have known” that the third country does not comply with the criteria set out in Article 38(1) of the APD. In fact, it is found in *Section 5.1.1.c* above that Turkey must not be considered by Greece as a safe third country for asylum seekers. In addition, it has been reported by many NGOs and concluded in several cases by the ECtHR that Turkey does not respect the principle of *non-refoulement* by precluding the access of refugees to Turkish territory at the border, or by returning them to the countries where their life or freedom would be threatened. As a result, when migrants arriving at the Greek islands are returned to Turkey based on the APD and pursuant to the EU-Turkey Readmission Agreement, Greece may violate the principle of *non-refoulement* both directly and indirectly.

5.1.3. Interceptions at the Greek-Turkish Border

While the EU-Turkey Statement officially sets out some kind of legal measures to prevent the access of asylum seekers and refugees to the EU territory, the unpronounced “illegal” measures aiming to keep the migrants out of the EU territory have also become manifested before and after the adoption of the Statement. In this respect, the legal measures specified in the Statement involved the commitment of Turkey to prevent (irregular) migration on maritime and land frontiers between the EU and Turkey, and the return

of all migrants who are not in need of international protection to Turkey on the ground that Turkey is safe for them and pursuant to the EU-Turkey Readmission Agreement (European Council, 2016b).

What had also been reiterated in the EU-Turkey Statement was the meeting of the EU leaders with Turkey on 7 March 2016. Accordingly, “Turkey ... agreed to take back *all irregular migrants intercepted in Turkish waters*” (European Council, 2016b, emphasis added). This ambiguous statement raises a couple of questions. First, who intercepts those migrants, and how? Second, are the intercepted migrants given the possibility to be identified as a refugee or a vulnerable migrant, and to lodge their asylum claims? Third, how will the principle of *non-refoulement* and the relevant international standards be respected? These questions are answered and analyzed below in this Section.

a. Push-backs... Continued

There is a reality that migrants attempting to cross from Turkey to Greece are intercepted either at maritime or land border between Greece and Turkey (see *Section 4.2.5.c*). The *non-entrée* policies imposed by Greece indiscriminately targets migrants attempting to cross from Turkey to Greece. Thus, the Greek authorities disregard the fact that there may be refugees and asylum seekers among those intercepted. As a result of the informal push-back practices executed at the Greek-Turkish border, migrants are deprived of accessing the EU territory and of the possibility to seek asylum in an EU Member State.

Despite the sharp drop in the number of crossings from Turkey to Greece after the implementation of the Statement, migrants continued to seek the same perilous journey in the Aegean Sea (see *Section 5.1.2.a*). In this regard, several civil society organizations reported that the Greek coastguards, solely or together with Frontex, engage in the interception of migrant vessels afloat. An incident in the Aegean Sea in June 2016 revealed that a boat carrying refugees from various countries of origin, including Syria, Eritrea and Iraq, was stopped by the Greek coastguard and Frontex in the Greek waters and forced to move onto the boat of the Turkish coastguard, irrespective of their asylum claim from Greece (WTM, 2016). In January 2019, migrants attempting to cross from Turkey to the Greek island of Samos were blocked by the Greek coastguard on the high seas while their boat was in distress, and handed over to the Turkish coastguard (*Hürriyet Daily News*, 2019). Comparing to the pre-EU-Turkey Statement era, while interceptions in the Aegean Sea have become less visible in the last four years, push-backs at the Evros have come to the fore.

Especially following the implementation of the EU-Turkey Statement, land interceptions at the Evros River have become more salient. As HRW (2018c) and the CoE (2018a, 2018b) reported, Greece indiscriminately engages in forcible push-backs at the Greek-Turkish land border. During her visit to Greece at the end of June 2018, the Commissioner for Human Rights of the CoE raised her concern about the consistent allegations of summary returns from Greece to Turkey (CoE, 2018a, p. 3). In addition, the CPT reported in the beginning of June 2018 that credible allegations have shown the engagement of Greece

in push-back practices involving the use of violence against and ill-treatment of migrants attempting to cross from Turkey at the Evros River, which lead to harm to their physical integrity (CoE, 2018a, 2018b).

In December 2018, HRW (2018c) reported forcible, routine and summary return of asylum seekers and migrants (from varying countries of origin, including Afghanistan, Iraq, Morocco, Pakistan, and Syria) by the Greek police at the Greek-Turkish land border in the Evros region. In addition, migrants and asylum seekers expressed that they encountered hostile and violent practices by the Greek police and unidentifiable masked paramilitary forces (ibid.). Accordingly, these practices involve unlawful detention of migrants and asylum seekers for lengthy periods in “prison-like” formal and informal detention centers close to the border and with the lack of capacity (HRW, 2018c; UNHCR, 2018b, 2018c). Furthermore, as HRW (2018c) reported, the Greek police and paramilitary engaged in the abuse of migrants and asylum seekers, and ultimately forced them back to Turkey after stripping them of their possessions. This, *inter alia*, indicates that forcible, informal and often inhuman push-backs employed by the Greek authorities at the EU’s external borders including in the Evros region have come to a state of routine operations which are aimed at the prevention of migrants and asylum seekers attempting to reach to the EU territory and to seek refuge.

b. Access to territory and to asylum versus the Greek push-backs

Despite the pronouncement of a set of formal guarantees under the EU-Turkey Statement, migrants attempting to access the EU territory encounter informal and forcible measures by Greece that are aimed at their summary removal to Turkey. In this connection, it is worth recalling the said safeguards:

“All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place *in full accordance with EU and international law*, thus *excluding any kind of collective expulsion*. All migrants will be *protected in accordance with the relevant international standards and in respect of the principle of non-refoulement*. ...” (European Council, 2016b, emphasis added)

Accordingly, the returns from Greece to Turkey under the EU-Turkey Statement must be carried out with respect to EU and international law, including the protection from *refoulement*, and must avoid the collective expulsion of migrants from the Greek islands. The principle of *non-refoulement* is laid down in various regional and international treaties including the Refugee Convention (Article 33) and the ECHR (Article 3) – all of which are ratified by Greece. Whereas collective expulsion of foreigners is prohibited under Protocol No. 4 of the ECHR, which Greece did not ratify, but also under CFREU (Article 19), hence must be respected by Greece as an EU Member State.

However, push-back practices of Greece merely disrespects the aforementioned guarantees. First, the continuous and systematic allegations of summary returns to Turkey at the Greek-Turkish border, which often involve the use of violence and ill-treatment of migrants and asylum seekers, contravene the principle of *non-refoulement* and the prohibition of collective expulsion of foreigners. The principle of *non-*

refoulement emerges as soon as a refugee or asylum seeker arrives at the borders of a state, and in principle, obliges that state to undertake a status determination procedure (Gammeltoft-Hansen, 2011b, p. 27). Therefore, whenever refugees or asylum seekers arrive at the Greek border, they must be allowed to enter and identified, rather than being pushed back to where they depart from. By doing so, Greece engages in both direct and indirect *refoulement* as it is highly likely that the migrants and asylum seekers pushed back to Turkey will be arrested or detained in degrading detention conditions, or will be expelled or returned to their countries of origin without a proper assessment of their asylum claims in Turkey (see also *Section 5.1.1.c* and *Section 5.1.2.b*). As a result, despite the promise in the EU-Turkey Statement of the protection of all migrants in line with the relevant international standards and the principle of *non-refoulement*, push-backs in the Aegean Sea and at the Evros River merely contravene this promise by forcibly and summarily excluding migrants from the EU territory.

Second, push-back practices at the Greek-Turkish border not only prevent the access of asylum seekers and refugees to safe soils, but also deprive them of access to asylum and to the secondary rights enshrined in the Refugee Convention. As interceptions indiscriminately target all migrants, they are not identified as refugees, no individual examination of their protection needs or claims nor their situational or individual vulnerability are taken into account. As a result, migrants are prevented from accessing the asylum procedures in the EU, regardless of their status or vulnerability, since they are precluded primarily from accessing to the EU territory. Instead, they are immediately and forcibly returned to Turkey. However, the prevention of migrants' access to Greek territory, which certainly prevents their access to asylum and to the secondary rights, as well as diverting the responsibility to grant these rights onto Turkey bring the questions as to whether Turkey will grant protection, or whether asylum seekers will be afforded quality protection (Gammeltoft-Hansen, 2011b, p. 30). As non-Europeans who are pushed back from Greece to Turkey will lack access to a refugee status and to the rights in line with the Refugee Convention, Turkey does not offer a quality protection to them (see also *Section 5.1.1.d*).

The collective expulsion of migrants through push-backs in the Aegean Sea and at the Evros River, *inter alia*, demonstrates that Greece protects its borders at the expense of human rights.⁴² As presented above, irrespective of the *modus operandi* and locus of the Greek push-backs, migrants attempting to reach the EU territory are precluded from doing so outside of any formal and legal procedure. While the EU-Turkey Statement envisages the legal and safe return of migrants from the Greek islands to Turkey, push-back practices merely disregard and contravene the rights of asylum seekers and refugees at the Greek-Turkish border under international and regional human rights treaties. However, the *non-entrée* policies

⁴² Push-backs, or interceptions at borders, can also be seen as a vindication of the paradigm change in the EU context as they are aimed at proactively and collectively preventing the entry of migrants to the territory of an EU Member State at the very border (see *Section 4.2.3*).

must not be utilized to justify human rights violations (see also *Section 5.1.1.c*). While Greece has a sovereign right to protect its borders and exert control over its territory, this right is limited. Indeed, Greece is also under an obligation to protect the rights of individuals within its jurisdiction, and some of these rights, including the protection from *refoulement*, are deemed as *jus cogens* – hence, must be respected at all times.

5.1.4. Interim Conclusion

This *Section 5.1.* analyzed the impact of the EU-Turkey Statement of 18 March 2016 on the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands and in Turkey. By doing so, it argued how their certain rights are/would be affected while they wait at the Greek hotspots for the assessment of their asylum claims for lengthy periods, when they are returned to Turkey pursuant to the EU-Turkey Readmission Agreement and on the ground that Turkey is safe for them, and when Greece engages in interceptions and push-back practices at the Greek-Turkish land and maritime border.

The first finding is that Turkey does not qualify as a safe third country under Article 38(1) of the APD as it engages in human rights violations vis-à-vis asylum seekers and refugees in the country. First, life and freedom of asylum seekers and refugees in Turkey are under serious threat due to the measures of the Turkish authorities, and there is no guarantee that those who are returned from the Greek islands will not encounter similar (or, even worse) kind of treatment. Despite the pertinent safeguards under the ICCPR and the ECHR, as well as the non-penalization of an illegal entry or stay as prescribed under Article 31 of the Refugee Convention, in the LFIP and the TPR, foreigners (including asylum seekers and refugees) in Turkey are detained solely on the ground of their unlawful entry to or stay in Turkey. Second, while under detention, they lack access to basic needs, are accommodated in poor and insanitary conditions, and destitute of communicating with lawyers, their families, and the UNHCR officials. They also face ill-treatment by the Turkish authorities amounting to inhuman or degrading treatment.

Third, thousands of asylum seekers and refugees are either prevented from entry to Turkish territory, or summarily returned at the Turkish-Syrian border, or are deported from deportation centers to their countries of origin, and in all cases, in violation of the principle of *non-refoulement*. As also established by the ECtHR in several cases, and reported by international and Turkish human rights organizations; Turkish *non-entrée* policies and deportations contravene the prohibition of *non-refoulement*.

Last but not least, non-European asylum seekers and refugees in Turkey do not have access to refugee status and the possibility to receive protection in line with the Refugee Convention. Although non-Europeans are provided access to protection and a set of rights under the LFIP and the TPR, they are not in line with the Refugee Convention, nor they are fully implemented in practice. In this respect, Turkey indeed lacks providing adequate protection to non-Europeans. In fact, both the LFIP and the TPR result in bifurcations, and the TRP in particular prevents Syrians from requesting international protection under the

Refugee Convention due to the geographical limitation retained by Turkey. As a result, Turkey does not offer quality protection to non-Europeans in the country.

Ultimately, as the uncertainty regarding the status of non-Europeans in Turkey preserves its topicality and significance, Turkey must be considered by the Greek courts as “unsafe” for them. A disregard of any of the criteria under Article 38(1) of the APD indeed will result in the denial of an applicant’s access to asylum, protection from *refoulement*, and access to the secondary rights under the Refugee Convention if he or she was granted a refugee status in an EU Member State.

The second finding is that the return of migrants from the Greek islands to Turkey pursuant to the EU-Turkey Readmission Agreement deprives them of access to the EU territory, and concomitantly of access to asylum and the secondary rights under the Refugee Convention. *Section 5.1.2* crystallized that disregard of the vulnerable situation of migrants by virtue of the fast-track procedure, lengthiness of the period for handling of asylum applications, inadequacy of the possibility to lodge their asylum claims at the hotspots, and the lack of effective remedies to challenge the rejection decisions regarding their applications deprive them of access to asylum, and to the secondary rights under the Refugee Convention. Ultimately, the returns to Turkey as per the EU-Turkey Readmission Agreement deprive the asylum seekers of all. When migrants are eventually returned to Turkey upon the decision by the Greek asylum authorities that they are not in need of international protection, they are no longer able to access the EU territory for quality protection: they are ensnared in a limbo in Turkey with the lack of access to a refugee status under the Refugee Convention, and the deprivation of certain other rights. The returns, *inter alia*, lead to the engagement of the EU (and of Greece in particular) in direct and indirect *refoulement*. This is mainly because, as the first finding established above, Turkey cannot be considered a safe third country. Nevertheless, the Greek authorities knowingly return the migrants to Turkey – to a country which itself subjects the asylum seekers and refugees to the risk to their life and freedom, and poses serious risk to expel or deport them to the countries where their life or freedom would be threatened.

This brings us to the last finding under this *Section 5.1*, that is asylum seekers and refugees are deprived of access to asylum and to the secondary rights under the Refugee Convention, and are not protected from *refoulement* also due to the push-backs at the Greek-Turkish border. As legal and safe returns conducted by the Greek authorities contravene the prohibition of *refoulement*, as well as deprive the asylum seekers of access to the EU territory, to asylum, and to secondary rights; informal push-backs at the Greek-Turkish border *a fortiori* deprive asylum seekers and refugees, who are forcefully removed to Turkish territory, of these rights. Indeed, refugees are granted the rights under the Refugee Convention based on the level of attachment they acquire from the country of destination (Gammeltoft-Hansen, 2011b). Once an asylum seeker is precluded from accessing the EU territory at the very border, it is impossible for them to access to asylum in the EU.

It can be argued herein that human rights law is in fact binding and effective. Indeed, there are international supervisory mechanisms (e.g. treaty-based and non-treaty based mechanisms of the UN), supranational organizations (e.g. ECtHR), human rights organizations (e.g. Amnesty, HRW) that are independent and impartial which uphold human rights over state interests. This is demonstrated also by the jurisprudence of the ECtHR, which substantiates the provisions of the Convention in a progressive and protective manner in favor of migrants (see for example *M.S.S.* and *Hirsi Jamaa* cases). In this regard, “[t]he Court provides substantive protection rather than keeping its approach purely procedural and focusing on the applicability of legal safeguards [enshrined in the ECHR]” (Viljanen & Heiskanen, 2016, p. 192). In addition, although there is no binding right to asylum or obligation of states to grant asylum in international law, there is the obligation of *non-refoulement* which is binding over states and can be considered as a first step for asylum seekers to obtain a legally recognized status in a destination state. In the recent years, this principle has been interpreted in a broader sense. For instance in the *Hirsi Jamaa* case, the ECtHR considered that the principle of *non-refoulement* applies also extraterritorially, which means that states are obliged to protect human rights not only within their territories, but also in the places where they exercise effective control outside their territory or territorial waters, resulting in the attachment of the jurisdiction of the ECHR under Article 1 of the Convention.

The point here, however, is that despite these epochal developments and extensive safeguards in international law, human rights violations vis-à-vis migrants, and particularly refugees and asylum seekers, persevere due to the challenges posed by states. It is, after all, at the sole discretion of the state authorities whether or not to uphold human rights over state interests or state’s sovereign rights, and whether or not to abide by the decisions of the ECtHR.⁴³ Even after the *M.S.S.* case, for instance, the poor living conditions at the detention centers in Greece have not been ameliorated. Similarly in Turkey, human rights violations vis-à-vis asylum seekers and refugees, including the infringement of their right to life at the Turkish-Syrian border, of their right to liberty and protection from inhuman and degrading treatment in detention and deportation centers, and of their protection from *refoulement* both at the border and in these centers, have persisted. Albeit these instances of human rights violations in Turkey, Greece has continued to return the migrants to Turkey pursuant to the EU-Turkey Readmission Agreement, or engaged in push-back practices at the border in violation of the principle of *non-refoulement* (cf. *Hirsi Jamaa* case). Therefore, the extension of the effectiveness of human rights law to refugees or asylum seekers is limited so long as states insist on their non-compliance with human rights instruments and on the presumption that their obligations are territorially-bounded or do not even exist.

⁴³ It is noteworthy that Article 46 of the ECHR prescribes the binding force of the Convention over the Contracting States. Notwithstanding, in several instances Turkey has not implemented the ECtHR rulings, and the Turkish President Erdoğan pronounced several times his dismissal as to the decisions of the ECtHR (*Reuters*, 2018).

5.2. Back to Arendt: The “Right to Have Rights” and the EU-Turkey Statement

The EU-Turkey Statement has demonstrated that the EU, Greece and Turkey, jointly and severally, engage in practices that uphold the protection of borders and the control on state territory over the rights of millions of refugees fleeing war and persecution in Syria and elsewhere. With a view to preventing the access of migrants, including refugees and asylum seekers, to Greece, and to shifting the burden of protection and migration management to Turkey; Greece and Turkey have implemented a plethora of measures under the Statement that contravene the rights of those seeking effective protection (see *Section 5.1*). As a result, protection seekers are excluded from the EU territory, deprived of the access to protection in line with the Refugee Convention, and of certain other rights. Rather than solely depriving refugees of certain set of rights both in Turkey and Greece, the EU-Turkey Statement deprives them of a more fundamental “right to have rights,” or a right to belong to some kind of organized community. In fact, the refugee who is deprived of access to the EU territory, or to a durable juridico-political status in Turkey or Greece is also deprived of access to a politically organized community in these countries.

In this connection, this *Section 5.2*, which is also the final section of this thesis before presenting the conclusions, recurs to the Arendtian “right to have rights.” By doing so, it considers Arendt’s criticism on the theory of human rights, as well as skepticism towards nation-states in the state-centric world order. It responds to the following research question presented in *CHAPTER I*:

How can the Arendtian “right to have rights” help us to understand the situation of the asylum seekers and refugees who are deprived of acting politically at the Greek-Turkish border, on the Greek islands and in Turkey by virtue of the EU-Turkey Statement?

The Section is divided into four sub-sections. *Section 5.2.1 (The EU-Turkey Statement: Setting up Physical and Structural Boundaries)* rearticulates the gaps embedded in international law which entail the physical and structural boundaries set by the EU, Greece and Turkey while implementing the EU-Turkey Statement. It establishes that due to these boundaries, the problem today is in fact access to a “right to have rights.” *Section 5.2.2 (The EU-Turkey Statement: Including Some, Excluding Others)* focuses on the exclusionary law- and policy-making in the EU and Turkey, which result in the exclusion of refugees and asylum seekers from respective territories, from the application of general law, and from the space of appearance. *Section 5.2.3 (The Border: Access to Territory and to a “Right to Have Rights”)* examines how the exclusion of refugees at the border from the EU territory leads to the lack of access to a right to have rights. *Section 5.2.4 (The Law: Access to a Juridico-Political Status and to a “Right to Have Rights”)* ponders on how the exclusion of refugees at the Greek hotspots and in Turkey from the application of general law leads to the lack access to asylum, and deprives them of access to a right to have rights. *Section 5.2.5 (The Polis:*

Access to the Space of Appearance and to a “Right to Have Rights”) elucidates how the exclusion of refugees at the Greek hotspots and in Turkey from the space of appearance deprives them of the membership in some kind of organized community, i.e. of access to a right to have rights. Overall, this Section aims to shed light on the political, legal and societal exclusion of the refugee from the world by virtue of the EU-Turkey Statement.

5.2.1. The EU-Turkey Statement: Setting up Physical and Structural Boundaries

The Arendtian “right to have rights” articulates how the international system fell through to protect the rights of refugees when they lost the protection in their countries of origin as they have been forced to flee war and persecution, and could not invoke or regain the rights they possessed elsewhere. In addition, it shows how the theory of human rights falls short of explaining the right to have rights, the guarantee of which is in fact humanity itself. In today’s context, however, it is still the case that the right to have rights is accessible only through one’s membership in an organized political community in a state. On the other side, despite the establishment of international institutions and courts, as well as the adoption of international human rights treaties in the interwar and post-World War II eras, states have continued to act within their territories and over their borders in the manner they please, in contravention of their human rights obligations and of the right to have rights.

As shown in *CHAPTER II*, the right to have rights denotes the right to belong to a certain organized community where one’s actions and opinions make sense. The emergence of millions of stateless persons and refugees due to the violent political events, including the two world wars as well as the 2015 migration crisis followed by the Syrian civil war in 2011, articulated that the loss of a right to have rights and a right to belong to some kind of organized community leads to absolute rightlessness. Such loss is irreversible as these rights could not be regained nor evoked in the countries of origin, transit or destination. At this juncture, the Arendtian “right to have rights” captures the situation of the refugee as the absolute rightless, and political, legal and societal exclusion of the refugee from the world. Indeed, the refugee’s loss of the “belonging to any polity” – or in Arendt’s words, of a right to belong to some kind of organized community – drives him or her outside of politics and from a world where his or her actions and opinions matter (Oudejans, 2014, p. 11). Hence, the loss of a right to have rights, i.e. the loss of juridico-political status, not only denotes the loss of the right to action and to opinion – which are meaningful only in a particular organized community, but also puts other rights in jeopardy. Indeed, this loss results in the deprivation of one’s appearance before and recognition by others in such organized community. Such loss drives one into his or her private sphere with “the ‘terrifying experience’ of ‘being unplaced,’ of having ‘no proper or lasting place, no place to be or to remain’” (idem, p. 18).

Notwithstanding the developments in international law with regard to the rights of refugees since Arendt coined the “right to have rights” in *The Origins*, there still exists gaps in international law, which create an area of maneuver for states and incentivize them to engage in restrictive measures, i.e. externalization of migration management. These gaps are (1) no obligation to allow the entry of those coming at the state borders, (2) inexistence of a right to asylum in a legally binding instrument, and (3) inexistence of an obligation to grant asylum in international law (see *CHAPTER II*). As a result, sovereign states deprive the refugee of a right to have rights even before he or she reaches the state territory, or if the refugee reaches the state territory, he or she is prevented from accessing to asylum (procedures) and/or to some kind of organized community. Today, therefore, the problem emanates from the sovereign right of states to prevent the refugee from accessing a right to have rights by setting up *physical boundaries* (i.e. ignoring his or her entry to the state territory), or even if they allow such entry, by setting up *structural boundaries* (i.e. denying their access to asylum procedures and/or to some kind of organized community) within their territories.

While it was the two world wars in the twentieth century that resulted in the creation of an immense number of refugees in Europe, now it is the migration crisis that created millions of *de facto* stateless and rightless persons. As presented in *Section 5.1*, the situation of the refugee has become even more poignant because of the measures taken by the EU, Greece and Turkey, which outsource the management of migration to Turkey. It has been clear, therefore, the EU, Greece and Turkey remain unwilling to provide protection as they uphold their sovereign rights over the rights of the refugee. In this regard, although the UNHCR, the ECtHR or the CJEU⁴⁴ may create a political impetus for accountability of EU Member States or Turkey in situations of offshored and outsourced migration management, the actual state practice persists to be indefinite and opaque as the political will of states engaged in externalized migration management has the ultimate say (Gammeltoft-Hansen, 2011b). This, *inter alia*, indicates that “sovereignty is nowhere more absolute than in matters of ‘emigration, naturalization, nationality, and expulsion” (Arendt, 1979, p. 278). While implementing the EU-Turkey Statement, the claim of the EU, Greece and Turkey to absolute sovereignty leads to the clash between their sovereign rights and the rights of refugees arriving at the EU’s external borders or in Turkey. Due to the *structural and physical boundaries* set by the EU, Greece and Turkey, therefore, the EU-Turkey Statement deprives the refugee not only of certain rights, but also access to a “right to have rights.” In fact,

“The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that *they no longer belong to any community whatsoever*” (Arendt, 1979, p. 295, emphasis added).

⁴⁴ It is noteworthy that the CJEU does not have jurisdiction to rule over the disputes concerning Turkey, as Turkey is not a Member State of the EU.

5.2.2. The EU-Turkey Statement: Including Some, Excluding Others

The clash between sovereign rights of the EU, Greece and Turkey, and the rights of individuals is embodied in the idea of exclusion in the EU and Turkey vis-à-vis the demand of asylum seekers and refugees for access to territory, to a durable juridico-political status, and to some kind of organized community. The EU-Turkey Statement in particular, and the EU and Turkish asylum regimes in general, are based on the inclusion of some and exclusion of others. In this regard, this thesis assesses the EU-Turkey Statement with the relevant practices, aspects and developments – as the gravity of human rights issues that asylum seekers and refugees encounter at the Greek-Turkish border, in Turkey and on the Greek islands is closely connected with the commitments of the EU and Turkey under the Statement and the preceding undertakings of both parties. It argues that the idea of exclusion, both in the EU and Turkey, is realized in three stages:

- (1) exclusion from the state territory – which contravenes the access of refugees to the EU territory and to a “right to have rights;”
- (2) exclusion from the application of general law – which contravenes the access of refugees to asylum (procedures) or to a durable juridico-political status, and to a “right to have rights;” and
- (3) exclusion from the space of appearance – which deprives refugees of access to a politically organized community, i.e. to a “right to have rights.”

These three stages of exclusion, solely or in unison, deprive the refugee of access to a “right to have rights.” First, exclusion of the refugee from the state territory is realized through the physical boundaries set by the EU and Turkey. In this regard, *the border* becomes the embodiment of the physical boundaries built by states vis-à-vis refugees. The EU’s external borders in general, the Greek-Turkish border and the Turkish-Syrian border in particular, are instrumentalized to facilitate the exclusion of the undesired or the outsider from the state territories. The sovereign states of Greece and Turkey blatantly show off their sovereign rights over their respective borders by precluding the access of non-citizens to their territories.

Second, exclusion of the refugee from the application of general law is realized through the structural boundaries by virtue of the adoption of exclusionary laws and policies. *The law* becomes the structural boundary which precludes the access of refugees to asylum (procedures), i.e. to a durable juridico-political status, in Greece and Turkey. In fact, the natural, inalienable or universal human rights are unable to extend to the refugee, since the refugee is deprived of a very right to have rights. Legal Positivists or liberals would disagree, as for them, *without law* there are no human rights. However, the case of the EU-Turkey Statement has demonstrated that *because of law*, the claim and enjoyment of human rights becomes jeopardized.

Third, exclusion of the refugee from the space of appearance is realized through the transformation of *the polis* into structural boundaries: *the polis* becomes the boundary. In ancient Greece, the “men” in the *polis* recognized the rights of one another and produced equality with their equals. Although the *polis* was deemed in the ancient Greece as the public realm or a place in the world where man could meet “together

with his equals,” this is not the case in Turkey nor in the Greek hotspots. When the refugee is not deemed by the men an equal in the *polis*, or even the access of the refugee to the *polis* is precluded, then the refugee becomes deprived of access to the space of appearance. Hence, the refugee becomes deprived of access to a “right to have rights.” Then human rights remain to be citizenship rights – rights attached to the very status of being a citizen of a state. In this respect, natural rights proponents would disagree, as for them, rights emanate from God’s revelation or from the very existence of human beings. However, when there are no other human beings to recognize the existence and appearance of a human being in the public realm, the refugee becomes deprived of the capacity to act: an actionless and opinionless “human nothing but human.” In fact, the *sine qua non* right is the right to have rights; without it, human rights cannot be claimed or enjoyed. *The border, the law, the polis*: they all exclude the refugee by posing boundaries and deprive the refugee of access to a “right to have rights” both in Turkey and Greece.

In particular, the EU asylum *acquis* is based on the idea of exclusion. The idea of including the desired legal migrants as insiders and excluding the undesired migrants as outsiders is at the very outset embedded in the CEAS itself. In this respect, the externalization of migration management and its instruments are the medium to realize this idea of exclusion. For the EU, externalization is rooted in the rationales of preventing the entry of (irregular) migrants (including refugees and asylum seekers) to the EU territory and diverting the burden of protection and migration management to third countries (see *Section 4.2.2*). These rationales are in fact embodied in the instruments of externalization with a view to excluding the undesired migrants from the EU territory. Those intercepted at the Greek-Turkish land and sea borders are informally excluded from the EU territory through *non-entrée* practices at the very outset. Those who come from a safe third country or from a first country of asylum are formally excluded pursuant to the EU-Turkey Readmission Agreement. Whereas those who remain at the Greek hotspots without access to asylum are excluded from the space of appearance, i.e. deprived of a place in the world. Ultimately, they are excluded from accessing to the territory of the EU, to a juridico-political status, and to some kind of organized community. Hence, they are deprived of access to a “right to have rights.”

Similarly, the Turkish asylum regime is predicated on the idea of exclusion. Hitherto being a transit country between the war-torn regions and Europe and currently having the largest refugee population in the world; Turkey have, *ab initio*, implemented laws and policies that include some and exclude others. Those who are fleeing war and persecution in Syria and prevented from accessing Turkish territory at the Turkish-Syrian border, or those who are expelled or returned to their countries of origin in violation of the principle of *non-refoulement* are excluded at the very beginning. Those who are not European are excluded from the application of the general rules under the LFIP due to the retention by Turkey of the geographical reservation to the Refugee Convention. Whereas those who are detained in detention or deportation centers without a lawful ground, or live in refugee camps in poor conditions, or are forced to live in satellite cities around

Turkey are excluded from the space of appearance itself. As a result, just as in the EU, they are excluded from accessing the EU territory or Turkish territory, to a juridico-political status, and to some kind of organized community; hence, to a “right to have rights.”

In the context of the idea of exclusion, migrants who fall under the implementation of the EU-Turkey Statement are excluded from all: from the state territory, from the application of general law, and from the space of appearance. The sections below separately examine this exclusion from the perspective of the Arendtian “right to have rights.”

5.2.3. The Border: Access to Territory and to a “Right to Have Rights”

As the EU, and Greece in particular, indiscriminately target migrants through the externalization of migration management to prevent their entry to the Union, the major challenge faced by refugees today is the access to territory. Since access to territory would enable the access of refugees to asylum procedures in the EU, as well as access to a certain political community, they are in fact deprived of access to a “right to have rights” when their access to the territory of the EU is denied at *the border*. Under the EU-Turkey Statement, a specimen of the EU’s efforts to externalize the management of migration, both Greece and Turkey engage in a set of formal and informal measures aimed at preventing such access. These measures, as discussed in *Section 5.1*, involve the return of asylum seekers and refugees from the Greek islands to Turkey under the EU-Turkey Readmission Agreement, provided that Turkey is a safe third country for asylum seekers or a first country of asylum for refugees, as well as the interception and summary return of migrants attempting to cross from Turkey to Greece at the Greek-Turkish land and maritime borders.

Due to the tension between state sovereignty and human rights, refugees and asylum seekers encounter extremely non-welcoming measures exercised by the EU, Greece and Turkey – which circumvent the access of refugees and asylum seekers to safe soils and protection from *refoulement*. Expulsion and return practices imposed by the EU, Greece and Turkey, *inter alia*, exclude refugees from state territories. Through externalization, the EU (as well as Greece and Turkey, under the influence of the EU’s externalized measures) seeks to find the remedy to prevent the refugee even before he or she reaches the EU by precluding his or her access to the respective territories: through the EU-Turkey Readmission Agreement, designation of Turkey as a safe third country, and push-back practices at the Greek-Turkish border. Despite the principle of *non-refoulement*, it is presumed by the EU, Greece and Turkey that the refugee (i.e. the *de facto* stateless) has ties with a former country where he or she can be expelled or returned. While *de jure* statelessness can be resolved by the acquisition of nationality, that is not the case for *de facto* statelessness or the refugee question (Oudejans, 2014, p. 22). This is because the refugee is in principle a national (or resident) of a country, and he can be returned home (*ibid*). However, a refugee is someone who has been forced to leave the country of origin on certain grounds and thereby lost the citizenship rights (Arendt,

1979; Cotter, 2005, p. 96). Therefore, although in principle the refugee is a national or citizen of his or her country of origin, the poignant situation in that country hinders him or her from returning there and exercising or regaining the rights as a citizen. So long as the war and persecution in Syria or elsewhere persists, the refugee must not be expelled or returned from safe soils to the places where they were forced to be stripped to their bare status and deprived of a right to have rights.

In this connection, both on the side of Greece and Turkey, the issue of excluding migrants from the respective state territories arises from the non-existence of an obligation under international or EU law to permit those who are seeking protection, and the efforts of Turkey and Greece to implement, *at all costs*, a deal aimed at excluding the migrants, who attempt to cross from Turkey to Greece, from the EU territory.

On the side of Greece, the refugee is excluded from the EU territory at the Greek-Turkish border. If a refugee, by any chance, accesses Greek territory at the Greek-Turkish border by sea or land routes, what is ought to be is that the Greek authorities must allow their entry by respecting the obligation of *non-refoulement* and subsequently commence the procedures to assess their asylum claims. Since there is no obligation, neither under international law nor in EU law, to allow persons requesting asylum entry into the territories of EU Member States, Greece faces difficulties with regard to practicalities and common standards pertaining to safeguarding human rights (den Heijer, 2011). As Greece assumes its obligations only when the subjects come under its territory, it easily denies the entry of those arriving at the Greek-Turkish land and maritime borders and engages in forcible push-backs against them. Therefore, the area of maneuver created by virtue of the gap in international law leads to the possibility for Greece (and for the EU in general) to evade their international legal obligations merely by excluding the refugees at *the border* and diverting the burden of migration management and of protection to Turkey under the EU-Turkey Statement.

On the side of Turkey, the refugee is prevented from accessing the EU territory and some are excluded from Turkish territory at the outset. Under the JAP and the EU-Turkey Statement, Turkey agreed to take back all migrants intercepted in Turkish waters, to admit the rapid return of all migrants not in need of international protection crossing from Turkey into Greece, and to end the (irregular) migration from Turkey to the EU – which prevent the access of migrants to the territory of the EU *per se* (see *Section 5.1*). On the other side, Turkey engages in similar or worse kind of practices at the Turkish-Syrian border with a view to preventing the access of refugees and asylum seekers to Turkish territory, as well as expels them to their countries of origin in violation of the principle of *non-refoulement*. These measures, solely or collectively, push the refugees back to war and persecution in Syria or elsewhere – countries where they were forced to become *de facto* stateless and rightless.

As can be observed from the implementation of the EU-Turkey Statement, externalization brings further externalization; refugees remain to be left *behind the border* with the lack of access to territory, and to a “right to have rights.” Third countries, e.g. Turkey, who undertake an outstanding burden due to the

outsourced and offshored migration management also engage in similar practices and adopt strict policies by restricting asylum and diverting protection obligations beyond their territories towards countries of origin (Gammeltoft-Hansen, 2011b, p. 236). As a result of these policies, the very concept of being refugee is impaired as refugees are driven to their countries of origin where the risk of persecution is highly likely (ibid). While refugees who are returned to Turkey pursuant to the EU-Turkey Statement lack quality protection and face the risk of being sent back to war and persecution in Syria or elsewhere, the ones who flee their countries of origin and aim to transit through Turkey to Greece are denied entry already at the Turkish-Syrian border. As a result of the physical boundaries (i.e. *the border*) set up by the EU, Greece and Turkey, refugees are prevented from accessing to a “right to have rights,” and to a right to belong to some kind of organized community in the EU. This is because refugees are at the very outset deprived of access to the state territories other than their countries of origin.

The refugee’s lack of access to territory affects also his or her access to a particular community. As the EU-Turkey Statement have demonstrated, the practices of preventing the access to a state territory by imposing border controls or the *non-entrée* policies, as well as of deporting an asylum seeker on the grounds that he or she comes from a “country of invention,” e.g. from a first country of asylum or a safe third country, have become ever more widespread. This blatantly displays the absoluteness of state sovereignty in the matter of expulsion (Arendt, 1979, p. 278). In this respect, the claim of Greece and Turkey to absolute sovereignty leads to the “active and willful expulsion of ... undesirable members for the sake of a national project” (DeGooyer, 2018). Whenever state interests, or national interests, prevail over human rights, as demonstrated by the mass denationalizations and denaturalizations implemented by the nation-states in the interwar period, as well as by the externalization of migration management through border controls, the *non-entrée* policies, and deportation to a country of origin or transit; the refugee becomes deprived of access to a “right to have rights” and to some kind of organized community in the destination countries.

Therefore, as Klabbers (2012, p. 243) underscores, the right to have rights is “negated in the case of refugees, migrants and the stateless” even in the contemporary international human rights law. Eventually, the law- and policy-making pertaining to domestic matters is left on the sole discretion of nation-states – they decide on the rules setting out who can enter their territory and who cannot, and who can be expelled from it (DeGooyer, 2018). The contemporary migration crisis in 2015 has also shown that Greece and Turkey are still unwilling to act in finding effective solutions to the problem that the refugee faces through his or her fundamental exclusion from the respective territories. As the refugee’s access to their territory is prevented by the Greek and Turkish authorities, in fact his or her access to a “right to have rights” is precluded. The refugee fleeing Syria or elsewhere can no longer claim his or her rights in a politically organized community merely because he or she is primarily excluded from Greek and Turkish territories. Therefore, the exclusion of the refugee from “the old trinity of state-people-territory” leaves him or her in a condition

of absolute rightlessness: the refugee not only loses citizenship rights, but is also deprived of action and opinion which are meaningful only in a particular organized community – which renders the claim of human rights almost impossible (Gündoğdu, 2015, p. 2).

5.2.4. The Law: Access to a Juridico-Political Status and to a “Right to Have Rights”

It has been clear in *CHAPTER II* that the right to (seek and enjoy) asylum is the refugee’s “right to have rights.” The right to asylum may be considered the *sine qua non* of the rights of the rightless, i.e. of the *de facto* stateless, as it entitles him or her to a set of rights in the countries of destination, including the secondary rights under the Refugee Convention, as well as access to a particular organized community therein. Upon the grant of a refugee status under the Refugee Convention, the refugee will be deemed to have achieved a durable juridico-political status in the country of asylum, hence he or she can be a legal and permanent resident of such country. However, the right to (seek and enjoy) asylum is not universal, inalienable or inherent. Although human rights have been manifested in human rights documents as universal, inalienable and inherent, they indeed need protection by a human artifice, i.e. in a state. In this regard, access to asylum procedures and right to asylum, too, must be guaranteed and enforced in a politically organized community. However, the inexistence of a right to asylum in a legally binding international instrument and of a moral obligation of states to grant asylum leaves an area of maneuver for state authorities in their internal affairs. In addition, asylum can be claimed only if asylum seekers are present in the territory of a state. As a result, Greece and Turkey confront the access of refugees to asylum, i.e. to a “right to have rights,” through the implementation of the EU-Turkey Statement: *the law* becomes the structural boundary to prevent such access.

As demonstrated in *Section 2.3.3*, the Kantian moral understanding articulates rights claims as a reciprocal obligation that human beings owe to each other. In this regard, the right of the refugee to asylum as a rights claim is *ought to* find its reciprocity in the state’s obligation to grant asylum. While for Kant, this reciprocity ascribes states the obligation to grant asylum to human beings in need of protection that they lost in their countries of origin, to Arendt it is the obligation not to deny one’s right to have rights or membership in a political community (Benhabib, 2004). As the grant of asylum would eventually entail also the access to a political community, and such right can be claimed only when the refugee is present on the state territory, the refugee must in fact first be allowed in the state territory.

It is the state which may allow or disallow the refugee’s access to a “right to have rights,” at its sole discretion. While the primary strife of the refugees fleeing Syria and elsewhere and attempting to cross from Turkey to Greece is to access to the EU territory for quality protection (see *Section 5.2.3* above), such access does not guarantee access to a “right to have rights” in Greece. Indeed, refugees may be deprived of

this access by way of various measures exerted by Greece or Turkey. They may be precluded from accessing to asylum procedures on the Greek hotspots, and rapidly returned to Turkey pursuant to the EU-Turkey Statement, or they may wait for lengthy periods for the processing by the Greek asylum authorities of their asylum claims. In the same vein, migrants who are expelled or returned from Greece to Turkey under the EU-Turkey Statement are not guaranteed access to a “right to have rights” in Turkey. Once they are returned to Turkey, they may be arbitrarily detained in detention centers in Turkey and prevented from applying for asylum, or even if they are granted some sort of protection, they may not be protected in line with the Refugee Convention. In any circumstance, they may eventually be expelled or returned by Turkey to a third country or to their country of origin in violation of the principle of *non-refoulement*. Therefore, as refugees are precluded from accessing to asylum (procedures), or to a durable juridico-political status, they are also deprived of access to a “right to have rights” both in Turkey and Greece.

First, the access of asylum seekers to asylum in Greece is hampered by the Greek authorities through the exclusion of those arriving from Turkey from the application of general law. In general, the idea of a common European asylum system is contingent on having porous internal borders with fortified and reinforced external borders protecting this area of free movement, security and rights of the insiders who are within the Union. Whereas many of the “irregular” ones coming at the EU’s external borders are deemed outsiders and not allowed to access to such area. In particular, those who are forced to remain on the Greek hotspots by virtue of the EU-Turkey Statement encounter hardships in accessing to asylum. In practice, as argued in *Section 5.1*, the Greek asylum system has numerous structural and procedural shortcomings, especially with regard to access to the asylum procedure, access to information concerning the asylum procedure, and the assessment of asylum applications. Pursuant to the EU-Turkey Statement, the inadmissibility test is applied even to the most vulnerable migrants, although the Greek law provides safeguards for migrants in vulnerable situations.⁴⁵ Even if the claims of protection seekers are taken into process after an inadmissibility test, they wait for lengthy of periods at the hotspots on the islands for the processing of their asylum claims. If their applications are declared inadmissible at the very beginning once they are found to have come from Turkey, they may be returned to Turkey pursuant to the EU-Turkey Readmission Agreement – to a country which, as further discussed below, also deprives refugees of access to a “right to have rights.” As a result of the lack of access to asylum procedures in Greece and the return of asylum seekers to Turkey, the refugee is deprived of a right to asylum or to a juridico-political status by way of *the law*, hence, deprived of the access to a “right to have rights.”

In addition, as the Turkish asylum regime is based on a *law* of exclusion, non-Europeans are deprived of a fundamental “right to have rights” at the very outset. In practice, Turkey includes some and

⁴⁵ Needless to say, those safeguards are *ought to be* the general law, whereas the fast-track procedure, i.e. inadmissibility test, is *ought to be* deemed to create an exclusion to the application of this general law.

excludes others through policy- and law-making. Those who are excluded, i.e. non-Europeans, are driven “outside the pale of law.” The first aspect of this *law* of exclusion involves detention. Those who are detained in detention centers in inhumane or degrading conditions around Turkey are precluded from accessing to asylum, or to a juridico-political status. They lack access to adequate information on the ways to seek protection in Turkey, or to an effective remedy to challenge the decisions over their detention or the decisions rejecting their protection claims. Those who are under detention, therefore, are unaware that they would have access to asylum – a right that would enable them to access to certain other rights and to some kind of organized community in Turkey.

The second aspect of the *law* of exclusion in Turkey underlies at the very core of law-making. In fact, both the LFIP and the TPR are codified with the purpose of including some and excluding others. In this regard, Turkey differentiates Europeans and non-Europeans, as well as Syrians and non-Syrians (see *Figure 1* and *Section 5.1* above). Even if non-Europeans in Turkey are granted some sort of a protection, this does not entitle them to a refugee status under the Refugee Convention. As Turkey retains the geographical reservation to the Refugee Convention, it does not recognize non-Europeans as “convention” refugees. Instead, Turkey subjects them to a bifurcated asylum system, which is overly discretionary and uncertain. While Syrians are precluded *by law* from applying for international protection in Turkey, their temporary protection status may be lifted any time by the Council of Ministers of Turkey at its sole discretion. In addition, neither the temporary protection status that may be granted to Syrians, nor the conditional refugee status that may be granted to non-Syrians entitle them to a substantial protection. Hence, none of these statuses afford non-Europeans protection in line with the Refugee Convention (see *Section 5.1*). In fact, both temporary protection status that may be afforded to Syrians or a conditional refugee status that may be granted to non-Syrians enable them to reside in Turkey only temporarily. While those under temporary protection will be returned to their countries (i.e. Syria) as soon as the war ends, those who are conditional refugees can reside in Turkey only until the UNHCR resettles them in a third country. Therefore, both Syrians and non-Syrians in Turkey are subjected to a system where they cannot have a durable juridico-political status which enables them to establish a long-term network of human relationships in some kind of organized political community. As a result, the access of non-Europeans in Turkey to asylum, and to a “right to have rights,” is circumvented from the very outset.

As Arendt reproached in the mid-twentieth century, human rights are nothing more than citizenship rights. The refugee, a citizen of Syria or of another country where war or persecution persist for an indefinite time, cannot claim and enjoy his or her rights merely because he or she is deprived of access to a “right to have rights” and to some kind of organized community in Turkey or Greece. As the refugee on the Greek hotspots or in Turkey are not a citizen of the respective countries, it is believed by the state authorities that they may be excluded, thereby they become “the anomaly for whom the general law [does] not provide”

(Arendt, 1979, p. 286). In fact, the making of distinctions, e.g. citizen and non-citizen, legal and irregular migrant, European and non-European, insider and outsider, has no end: because there will always be some exceptions to some sort of general law as Agamben suggested (Schotel, 2013). Indeed, the understanding that the right is what is good for some groups of people will always include some and exclude others:

“A conception of law which identifies what is right with the notion of what is good for – for the individual, or the family, or the people, or the largest number – becomes inevitable once the absolute and transcendent measurements of religion or the law of nature have lost their authority. And this predicament is by no means solved if the unit to which the ‘good for’ applies is as large as mankind itself.” (Arendt, 1979, p. 299)

Therefore, the ones who are excluded from the application of general law, or from the unit of people for whom the “good for” applies are in fact abandoned to “their bare humanity,” and without access to a “right to have rights.”

5.2.5. The Polis: Access to the Space of Appearance and to a “Right to Have Rights”

“We became aware of the existence of a right to have rights ... and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation” (Arendt, 1979, p. 297). When millions of refugees had to flee their countries in the summer of 2015 to reach the territory of EU Member States, not all of them were welcomed. That was the time also when we became aware of them, and of the existence of a right to have rights, which they already lost. Refugees not only lost the protection they had in their countries of origin, but have also been deprived of the right to membership in a politically organized community, i.e. of a place in the world, where their opinions and actions are significant. The adoption and subsequent implementation of the EU-Turkey Statement, as well as the concomitant policy- and law-making process in the EU and Turkey, deprived those refugees not only of access to a right to have rights, but also to the right to belong to some kind of organized community: they could no longer belong to another *polis*, a place in the world. They are nowhere able to regain or evoke these rights which they lost in Syria, Iraq, Afghanistan, African countries, or elsewhere – which may eventually jeopardize other rights. In fact, “Man ... can lose all so-called Rights of Man” because of “the loss of a polity” (ibid.).

As revealed in *CHAPTER II*, human rights can be fully enjoyed only when both performative aspect (i.e. appearance) and affirmative aspect (i.e. recognition) of the right to have rights are together. Affirmative aspect is essential for the recognition and protection of rights. This means that the recognition of one’s existence and appearance in a political community, and of his or her rights is indispensable for the realization of one’s rights. Protection, as Triandafyllidou and Dimitriadi (2013, p. 616) argue, “is more than physical: it is also about recognizing the autonomous character of the individual and enabling that person to

build a new life.” Therefore, law- and policy-making in a given country may not only deprive the refugee of human rights, but also leads to the exclusion of the refugee from the space of appearance by depriving him or her of access to some kind of organized community, i.e. to a place in the world.

Performative aspect is of significance for the refugee’s voice to be heard by others. Those who are deprived of a right to have rights endeavor to make their opinions and actions to be taken into consideration by endeavoring to access to the space of appearance. This is because it is the refugee’s existence in this space of appearance, i.e. his or her relationship with others, leads us grasp the very existence of freedom – not his or her relationship with oneself (Arendt, 1961, p. 148). In fact, the *raison d’être* of politics is freedom, and its realm of existence is action (idem, p. 146). The outer world necessitates a common public space, a politically organized world, where “free men” can meet and express themselves by words and deeds (idem, p. 148). In this common world, it is one’s political participation with words and deeds which sets him or her free. Indeed, the actual content of freedom is one’s accession to public affairs, or admission to the public realm by acting politically (Arendt, 2006, p. 22). It is the “political” which has the superiority in the construction of rights: because rights are insurrectional (Balibar, 2013, p. 25). Therefore, political participation and appearance before others in the space of appearance, are essential for one’s capacity to act to claim and enjoy his or her human rights. When one is deprived of the capacity to act, whether this incapacity is caused by external or internal obstacles, one can no longer be referred *qua* free (Arendt, 1961, p. 161). Being excluded or expelled from a political community leads to one’s deprivation of the capacity to act; of the right to action and opinion.

Refugees and asylum seekers on the Greek islands and in Turkey demand their rights through striving to appear before others with their words and deeds. When asylum seekers rioted on 18 July 2017 against “squalid living conditions” in Chios were suppressed by the security forces and found guilty by a court in Chios (CoE, 2018a, p. 5), when protests by migrants have erupted due to insecurity and poor living conditions in Moria camp on Lesbos (European Parliament, 2018), when the refugees protesting against the migrant deaths in the Aegean Sea in September 2015 were arrested by the Turkish police (*Cumhuriyet*, 2015); they in fact claimed a right to have rights. Only after their arrestment or appearance before the court they started to be treated as good as a criminal. In fact, the refugee, who was under detention just because his or her presence in Turkish or Greek territories, who faced the threat of deportation both in Turkey and Greece, or who has been transferred to a refugee camp or to a satellite city in Turkey, may be treated almost like a citizen because of a trivial crime (Arendt, 1979, p. 286). However, the efforts of the refugee to appear before others, i.e. his or her supposed equals, in a given political community *per se* have not been adequate for his or her access to a “right to have rights.” Indeed, the refugee’s efforts for rights claims through his or her appearance in some kind of organized community must be welcomed by others in that community.

This brings us to the second aspect of human rights, the affirmative aspect. When Kant expounded that rights claims are universalist moral claims regarding the obligations owed to human beings as human beings (Benhabib, 2004, p. 66), he was not completely wrong. Rights claims indeed are *ought to be* reciprocated by an obligation to recognize and ensure these claims. In this respect, it is the EU, the Greek and Turkish authorities which must recognize, as well as safeguard and enforce the rights of migrants, including of asylum seekers and refugees, within their respective territories; and it is the humanity, the locals in certain communities on the Greek islands and in Turkey, which must acknowledge their rights. Without the recognition of rights in a given political community and protection obligations assumed by the EU, the Greek or Turkish authorities, refugees are left in “their bare humanity.” Those waiting on the Greek islands, non-European refugees in Turkey, those fleeing war and persecution in Syria and elsewhere are all situated in a limbo and “outside the pale of law”: because of the idea of exclusion in Greece or Turkey and the lack of a government recognizing and protecting their rights.

The first dimension of the affirmative aspect is the obligation of others in a certain community to recognize the refugee’s rights. When the idea of exclusion takes control in *the polis*, we cannot talk about the law of equality, thereby about the recognition of one’s rights in *the polis*. Indeed, those who fled the war and persecution in Syria or elsewhere are no longer deemed as equals by the local communities in Turkey or on the Greek islands. However, action and opinion, the performative aspects of claiming and enjoying human rights, can only be realized with the surrounding presence and affirmation of others of action and opinion of the rightless. The clashes among hotspot residents on Chios and Lesbos; clashes between locals, including members of far-right groups, and migrants in the Aegean Islands in 2018 (CoE, 2018a; European Parliament, 2018); the periodical violent attacks against Syrians in the Turkish cities (Baban, Ilcan & Rygiel, 2017) have demonstrated that the refugee’s rights claims and demand of a place in the common world are not reciprocated by others in the same community: they are not deemed as equals, neither in Turkey nor on the Greek islands.

The second dimension of the affirmative aspect is the obligation of the EU, Greek and Turkish authorities to recognize the presence, as well as action and opinion, of refugees within the respective territories. First, exclusion of those who wait in poignant living conditions at the Greek hotspots from the space of appearance not only deprives them of certain rights, but also of a place in the world. In fact, they are deprived of access to a “right to have rights.” The reception camps, i.e. hotspots, on the Greek islands – which have been established through exclusionary law- and policy-making in the EU – leads to separation between the local communities and the migrants arriving on the islands. In fact, the hotspot is used as a space of social sorting and exclusion of incoming migrants, and a device to slow down and deter the movement of people to the EU territory (Kallio, Häkli & Pascucci, 2019). In this state of exception, asylum seekers at the hotspots are destitute of claiming their rights from the Greek authorities, including protection

from *refoulement*, protection from torture et al., and the right to freedom of movement, which are enshrined in international human rights conventions. With the lack of access to information regarding their administrative situation, access to asylum, and access to rights for years (CoE, 2018a), asylum seekers at the hotspots are trapped in a limbo. They are excluded not only from the territory of the Greek mainland and are confined to an island, but they are excluded also from the general application of law, and from the space of appearance. Indeed, the main idea on the islands is returning them to Turkey as quickly as possible pursuant to the EU-Turkey Statement, and in the meantime, enclaving them in the camps in “their bare humanity” to prevent their departure from the islands to the mainland.

In addition, non-Europeans in Turkey have been forced “outside the pale of law” and are excluded from the space of appearance. As discussed above, they are first excluded from the application of general law, and often from Turkish territory, and their utmost exclusion is realized by excluding them from a certain political community. Syrians, on the one hand, are granted a temporary protection status which entitles them to a temporary right to stay in Turkey – only until they are returned home when the conditions in Syria ameliorate. Non-Syrians, on the other hand, who may be granted a conditional refugee status, too, can only reside temporarily in Turkey – only until they are resettled by the UNHCR to a third country. While some non-Europeans are detained in detention or deportation centers for the purpose of return, some non-Syrians are transferred to satellite cities around Turkey, and some hundreds of thousands are in the camps operated by the Turkish authorities (European Commission, 2019d). The ones who are detained in detention or deportation centers, or transferred to satellite cities or camps cannot even live with their equals in the cities (i.e. *the polis*). The ones who live in *the polis*, on the other side, face insecurities and clashes between the local communities (Baban, Ilcan & Rygiel, 2017). By virtue of the temporariness of their status in Turkey, they never feel belonged to a certain political community, nor access to certain set of rights – because they are deprived by the Turkish authorities of access to a “right to have rights.”

In addition to their exclusion from some kind of organized community, the status granted to non-Europeans in Turkey entitles them only to a limited access to rights. They encounter administrative and legal boundaries in accessing to labor market, to education, and to other rights through the laws of exclusion in Turkey (see *Section 5.1*). They are deprived of the right to freedom of movement and right to liberty in detention and deportation centers, in camps and in satellite cities in Turkey. Furthermore, they face other human rights violations, including ill-treatment by the Turkish officials which amount to inhuman and degrading treatment, expulsion and deportation practices in violation of Turkey’s obligation of *non-refoulement*, even though such rights are codified in a set of international human rights treaties – which Turkey ratified. Despite these instances of human rights violations, however, not all of them can access to courts, not all of them can make their voices heard by others: because they are precluded primarily from accessing to the space of appearance in the *polis* and to a “right to have rights.” As can be observed from

these instances, the rights of asylum seekers and refugees in Turkey and in Greece can be taken away such easily by the state authorities at their discretion and cannot be regained by the refugee.

This blatantly reminds us the Arendtian criticism that equality and rights are not given to humans by birth, but they are constructed by human organization, from the existence of humans in the public realm. As discussed in *Section 2.3.2*, human beings are entitled to rights not just because they are human beings, but because of their belonging to or membership in a particular political community, i.e. the *polis*. Only the *polis* would render the refugee equal. Human rights can be exercised only before and with one's equals; with free deeds and living words in the *polis*, i.e. in their common world. Therefore, the recognition of the refugee's existence and of his or her rights in the organized communities in Turkey and on the Greek islands is vital, regardless of how hard they endeavor to make their voices heard by action and opinion.

When refugees and asylum seekers on the Greek islands and in Turkey are precluded from mingling with the locals through their confinement to hotspots, transfer to satellite cities or camps, or through detention and expulsion practices, they are indeed deprived of the capacity to act. Hence, they are hindered from building a network of human relationships with their opinions and actions "together with [their] equals and only with [their] equals" (Arendt, 1979; Arendt, 1998). When they are in the hotspots, camps, satellite cities, detention or deportation centers, they are out of sight and out of mind: human rights issues they encounter are unseen to those in the *polis*. In fact, when the refugee is deprived of the right to belong to (or membership in) a political community, i.e. a place in the *polis* as Arendt defines in *On Revolution*, the space where one's words and deeds matter; that individual may lose also other rights, the precondition of which is such belonging or membership. Without opinion and action (or, words and deeds), refugees on the Greek islands and in Turkey are regressed to their passivity; to a deprived life. This deprived life deprives them of claiming and enjoying other rights; prevents them from fighting for their rights. The loss of a right to have rights, therefore, not only denotes the loss of action and opinion which are meaningful only in an organized community, but also entails the loss of human rights. This is because the loss of the first renders the claim of other rights almost impossible. Therefore, deprived life is a life in a state of exception; a life without opinion, action and appearance: a life without a "right to have rights." As humans are visible to the world only through their existence and physical appearance, and their recognition in a political community, a place where their actions gain a revelatory character (Arendt, 1998), their vanishment from such community, i.e. deprivation of their existence in the space of appearance, is not different from their death.

CHAPTER VI

Conclusion: Rethinking Rightlessness

The overall aim of the research was to examine the effects of the externalization of migration management in the EU context on the rights of asylum seekers and refugees at the Greek-Turkish border, on the Greek islands and in Turkey. Specific focus was given to the EU-Turkey Statement of 18 March 2016 which was adopted after the 2015 migration crisis, and the pertinent practices, aspects and developments transpired from the mid-2015 until February 2019. By drawing upon the Arendtian “right to have rights,” the research concludes that the EU-Turkey Statement deprives refugees and asylum seekers at the Greek-Turkish border, on the Greek islands and in Turkey not only of certain rights, but also of a fundamental “right to have rights.”

CHAPTER II and *CHAPTER V* demonstrated that despite the developments in international law in the last seventy years, there still exist gaps in international law which create an area of maneuver for states. In particular, the gap in the field of international refugee law arises from the inexistence of an obligation to permit those who are trying to access to state territories, the inexistence of a right to asylum in a legally binding international instrument and of an obligation of states to grant asylum to protection seekers. The area of maneuver created by this gap leads to the clash between sovereign rights of states and the rights of refugees and asylum seekers who are present or seek to be present on state territories. The countries of destination, therefore, may easily engage in the externalization of migration management.

As discussed in *CHAPTER IV* and *CHAPTER V*, the externalization of migration management, and the EU-Turkey Statement in particular, is a result of this area of maneuver created by the gaps in international law. In fact, states assume obligations only when the subjects come under their sovereignty or jurisdiction (Hirsch & Bell, 2017). In this connection, through direct or indirect actions of the EU and Greece outside the EU territory (particularly, in Turkey) pursuant to the EU-Turkey Statement, the sovereignty of migration management is extended beyond such territory with a view to preventing the access of refugees to Greece and to shifting the burden of protection to Turkey (see *Section 4.2.2*). Under the influence of the Statement, while Turkey imposes strict controls and practices to hinder the movement of migrants to the EU, and further tightens the Turkish-Syrian border to prevent the transit of refugees to Turkey (and subsequently to the EU); Greece informally pushes them back to Turkey at the Greek-Turkish land and maritime borders or formally returns them to Turkey on the basis of readmission. Therefore, due to the externalized migration management led by the gaps in international law, refugees merely shuttle between the countries who are unwilling to provide protection (Heck & Hess, 2017). As a result, externalization brings further

externalization, and refugees are deprived of certain set of rights behind the frontiers or within the countries which lack providing quality protection.

The implementation of the EU-Turkey Statement results in the disregard, and even violation, of the rights of migrants at the external borders, on the Greek islands and in Turkey (see *Section 5.1*). While the purpose of migrants is accessing to a legally recognized, unambiguous status which enables them to access to the secondary rights under the Refugee Convention; they are trapped in limbo, either in Turkey or on the Greek islands. In this regard, they are deprived of access to asylum and to the secondary rights enshrined in the Refugee Convention in two different stages. First, asylum seekers wait for lengthy durations for the processing of their asylum applications at the Greek hotspots. Second, the entry of migrants to Greek territory is denied by the Greek authorities at the Greek-Turkish sea and land borders through their indiscriminate interception (i.e. without taking the status of migrants into consideration, as to whether they are asylum seekers or refugees) and forcible diversion towards Turkey; and the asylum seekers and refugees are returned to or left in Turkey by conniving at the precarious political, legal, social and economic circumstances pertaining to non-Europeans in Turkey. This latter stage leads also to direct and indirect *refoulement*.

As discussed in *CHAPTER V*, the Turkish asylum regime is bifurcated and does not provide quality protection for non-Europeans. Turkey does not ensure certain safeguards to non-Europeans in the country as there is no right for them to obtain asylum and access to rights in line with the Refugee Convention, and they lack the opportunity to be protected from *refoulement*. Indeed, Turkey transfers some asylum seekers and refugees in the country to camps or satellite cities, or detains them in deportation and detention centers without access to information and to asylum, or engages in push-back practices at the Turkish-Syrian border, or removes some of them to the countries where there is a serious threat to their life and freedom, and fails to protect even the rights of those who reside in the cities. Therefore, implementation of the EU-Turkey Statement impairs the right of refugees to access to asylum, and to certain other rights, as well as undermines the principle of *non-refoulement*.

Therefore, we must rethink the Arendtian “right to have rights” to understand this contemporary phenomenon. When the theory of human rights falls short of explaining why the refugees at the Greek-Turkish and Turkish-Syrian borders, on the Greek islands and in Turkey are still left rightless in an age of rights, the right to have rights beacons us to elucidate this perplexity. As shown above, the main problem today arises not from the lack of access to citizenship, but from the refugee’s lack of access to state territory, to asylum (procedures) or to a juridico-political status, and to some kind of organized community in the destination country. Hence, the issue today is the access to a “right to have rights” due to the territorially bounded and state-centric nature of the *status quo* international order. In fact, the refugee’s access to a “right to have rights” is hindered even before he or she reaches a state territory due to the *physical boundaries* set up by the destination state, or even if the refugee reaches such territory, due to the *structural*

boundaries existing in that state. At this juncture, even one's appearance before others in a politically organized community is prevented through various measures imposed by the state authorities.

In fact, the refugee is deprived of access to a "right to have rights." With the motivation to externalize the management of migration under the EU-Turkey Statement, Greece does not assume an obligation to allow those seeking entry to its territory or to provide protection to those at the Greek-Turkish border or at the Greek hotspots. Likewise, non-Europeans in Turkey are subjected to exclusion. Through the interception of migrants at the Greek-Turkish land and sea frontiers, prevention of their movement to Greece, and return of protection seekers who are deemed to be not in need of international protection from the Greek islands to Turkey; refugees are first excluded at *the border* from the EU territory. If they succeed to be present on the Greek territory by seeking perilous journeys in the Aegean Sea or over the Evros River, or when they are abandoned in Turkey, they are excluded by way of *the law* from the general application of law from accessing to a durable juridico-political status. They eventually are excluded in *the polis* from the space of appearance, as they are deprived of a place in the world because of their *incapacity to act* before a political community to recognize and protect their rights in Greece and Turkey. As a result, refugees at the borders, in Turkey and on the Greek islands are deprived of a fundamental "right to have rights."

The refugee deprived of access to a right to have rights (and to a right to belong to a certain political community) on the Greek islands, in Turkey and at the borders becomes the absolute rightless. The deprived refugee may not even be provided for the most fundamental human rights, including the rights to life and to liberty, rights to work and to education, protection from torture et al. and from *refoulement*. In order to achieve these rights, the rights of refugees at the borders, on the Greek islands or in Turkey must be recognized and guaranteed by a human artifice. Without recognition and protection of rights in a particular political institution, refugees at the borders, on the Greek islands and in Turkey are abandoned to a "deprived life," without action and opinion: they are entirely excluded from the space of appearance.

On the other side, we have been told for centuries that human rights are universal, inherent and inalienable, and that they are more than citizenship rights. What Kant asserted was that each human being is free, and has rights simply by being a member of the human species – hence, each human being is entitled to human rights not because they are a national or a citizen of a certain country (Benhabib, 2004). What Turkey does in practice, however, is differentiating between Europeans and non-Europeans, Syrians and non-Syrians, hence establishing a law of exclusion based on the refugees' country of origin – which also affects the rights they are entitled to in Turkey. What the EU does, likewise, is the total exclusion of those who are undesired from the EU territory – thereby who do not deserve protection as much as the desired ones – through the externalization of migration management.

What must be considered, at this point, is that when one is forced to be present in a country other than a country of origin, the destination country may disregard its obligation to recognize and ensure his or

her right to have rights, at its sole discretion. Indeed, “the sovereign is defined precisely by deciding who are included in the legal order and who are refused access to the rule of law” (Gammeltoft-Hansen, 2011b, p. 228). The ones refused the access are regressed to *homo sacer* – life without the protection of law (ibid.). As Arendt reprehended more than sixty years ago, therefore, human rights indeed have a national and artificial character; they are “mere puffs of words.” Ultimately, human rights which are deemed inalienable, inherent and universal for centuries can be lost and cannot be regained by refugees; because they are deprived of access to a “right to have rights.” The rights may, otherwise, be unequivocally at stake.

This thesis comes to the conclusion that Arendt remains as a great source of illumination for our contemporary issues since no authority is left to protect, and no world government or world organization can guarantee the rights of those who are regressed to their bare humanity due to the deprivation of their citizenship rights and the loss of a right to belong to a certain political community upon their escape from Syria or elsewhere. The refugee is deprived of a fundamental “right to have rights” by virtue of the implementation of the EU-Turkey Statement. Indeed, they are deprived of access to a “right to have rights” as they are prevented *en masse* from accessing the state territories through *physical boundaries*, and from accessing to a durable juridico-political status and to some kind of organized community through *structural boundaries*.

So long as states are the sole guarantor of human rights, there will always be persons who are deprived of access to a “right to have rights.” This research, therefore, has broader implications than the 2015 migration crisis stormed in Europe. In this respect, it implies that many of the human rights issues faced by human beings, the stateless, and the refugee around the world can be assessed from the perspective of the Arendtian “right to have rights.” When Dominicans of Haitian decent were stripped of their citizenship and deported by the Dominican Republic; when Rohingya refugees had been forced to flee Myanmar, revoked of their citizenship, and deprived of access to the territories of neighboring countries including Thailand, Malaysia, India and Bangladesh; when millions of refugees around the world are left in the refugee camps in their “bare life;” when minorities all around the world are oppressed by the governments; they have become “human nothing but human” and indeed been deprived of access to a “right to have rights.” In addition, if the EU-Turkey Statement is replicated to a wider context, there will be more human beings deprived of such access. Those who are deprived of a right to have rights, therefore, wait for their voices to be heard and for their rights to be acknowledged. The Arendtian “right to have rights” would at least shed light on the perplexities of their rights through the recognition of a wider humanity.

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